Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

KEITH ROONEY, by and through his next best friend, JOHN ROONEY, JR., his father; JOHN ROONEY, III; JOHN ROONEY, JR.; and MARSHA ROONEY, his wife,

Petitioners,

v.

GEORGE LEE WATSON, individually and in his official capacity, and the COUNTY OF VOLUSIA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

I. Whether a substantive due process violation exists under 42 U.S.C. § 1983 when a deprivation of life and property occurs from a non-pursuit high-speed crash resulting from a police agency's "custom or policy" and/or "failure to train" its deputies.

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I. Review is warranted because the opinion of the Eleventh Circuit conflicts with prior decisions of this Court and the Third, Fourth and Ninth Circuits (the last of which review is pending) on a significant matter of interpretation of 42 U.S.C. § 1983, i.e., whether a substantive due process violation exists when a deprivation of life and property occurs from a non-pursuit high-speed crash resulting from a governmental agency's "custom or policy" and/or "failure to train", and it is of national importance to create uniformity in the treatment of these cases 11

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PETITION FOR A WRIT OF CERTIORARI

Keith Rooney, John Rooney III, John Rooney, Jr., and Marsha Rooney respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit is reported at 101 F.3d 1378 and is reprinted in the Appendix to this Petition at App. 1-10.

The Order of the United States District Court for the Middle District of Florida granting summary judgment in this case was not reported. It is reprinted in the Appendix at App. 11-22.

JURISDICTION

The Circuit Court of Appeals issued its opinion upholding the district court on December 26, 1996. Petitioners timely filed a Motion for Rehearing/Suggestion of Rehearing En Banc to the Eleventh Circuit, which was denied on May 22, 1997. App. 23-24.

Petitioners invoke this court's jurisdiction to review the opinion of the Eleventh Circuit under 28 U.S.C. § 1254(1).

STATUTORY, CONSTITUTIONAL PROVISIONS AT ISSUE

Title 42, United States Code, Section 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Fourteenth Amendment to the United States Constitution, Section I

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On January 14, 1993, the Petitioners brought suit against the Respondents in the United States District Court, Middle District of Florida, charging them with violating Petitioners' civil rights and with a state law claim. App. 25-31. Jurisdiction was premised upon 28 U.S.C. § 1343(a)(3) and 28 U.S.C. § 1331 for the federal cause of action, and pendent jurisdiction over the state claim. The complaint was amended once and the Petitioners sought to amend a second time, which matter was pending when the Respondents filed a Motion for Summary Judgment on the federal claim.

On January 23, 1995, the District Court entered summary judgment on the civil rights claim set forth in the First Amended Complaint, finding the Petitioners did not suffer a "constitutional deprivation", and declined to exercise its supplemental jurisdiction over the state law claim. App. 11-22.

On February 16, 1996, Petitioners appealed the District Court's Order to the Eleventh Circuit Court of Appeals, which upheld the district court's decision.

A. The Parties and Incident Below

On January 23, 1989, at approximately 9:05 p.m., the Petitioners, JOHN ROONEY III and KEITH ROONEY, "met" the Respondent, GEORGE LEE WATSON, in a high-speed crash on a rural road in Volusia County, Florida. Sheriff's deputy George Watson was operating his patrol vehicle pursuant to a *de facto* custom and policy of

the Volusia County Sheriff's Office by driving at excessively high speed without lights or sirens. Watson was not involved in a pursuit or any other type of emergency call; rather, he was just "cruising", as he characterized it. He was traveling at 82 miles per hour in a 55 mile-per-hour speed zone. It was not his first accident with his patrol vehicle, and he – as well as all other Volusia County deputies – was never trained to operate his vehicle at high speeds.

The Rooney boys were in their truck attempting to make a turn, traveling at less than 10 miles per hour. Watson's oncoming vehicle struck them nearly head-on at about 73 miles per hour, the decrease in speed attributed to his going off the edge of the roadway into the direction of the boys' truck, and possible slowing. Had Watson been doing the speed limit, the Rooneys would have cleared the intersection and there would have been no collision. After the vehicles flipped around and came to rest, John released himself from his seat belt/shoulder harness and pulled his unconscious brother from the truck.

The truck then exploded in flames from the impact. It was at that time that John first noticed that the vehicle that struck his was a sheriff's patrol car.

Keith lay in a coma for nine days with substantial head injuries. John lost his front teeth and sustained a gash to his chin. Watson was barely injured. Keith sustained the worst injuries, suffering a closed head injury that permanently impairs his cognitive and other functions. His treating physicians estimate the former "A" student is 50 percent permanently partially disabled.

B. The Claims and Record Evidence Below

Petitioners sued George Watson and Volusia County for violating their civil rights, and for state law negligence. The civil rights count of their complaint, after stating that Watson was acting under color of state law, alleges, *inter alia:*

> WATSON was acting pursuant to a persistent and widespread practice of VOLUSIA COUNTY's Department of Public Safety, in which he and fellow VOLUSIA COUNTY employees operated their county vehicles, i.e., dangerous instrumentalities, with indiscriminate use of speed. Speeding by sheriff's deputies in VOLUSIA COUNTY for non-emergency matters, particularly without the use of lights or sirens, was a common and widespread practice of which the Defendant VOLUSIA COUNTY had actual or constructive knowledge and failed to correct, displaying a deliberate indifference toward police misconduct that had a tendency to violate, and did violate, citizens' civil rights. Additionally or in the alternative, VOLUSIA COUNTY improperly trained their deputies, including Defendant WATSON, in the use of their vehicles, particularly in the specific use and handling of the vehicles at high speeds. This policy of indiscriminate use of speed violated citizens' constitutional rights such that the need for further training was or should have been plainly obvious to VOLUSIA COUNTY policymakers who, at least until the time of this accident, were deliberately indifferent to the need.

App. 28. Petitioners further alleged that

> Defendant VOLUSIA COUNTY'S tacit knowledge and approval of Defendant WATSON'S indiscriminate use of high speed, and/or VOLUSIA COUNTY'S failure to properly train deputies including WATSON in the proper use of their vehicles at high speeds, subjected the Plaintiffs to a deprivation of their rights to life, liberty and property; their rights to procedural due process; and their rights to travel protected by the privileges and immunities clause, all guaranteed by the United States Constitution.

App. 29.

In the light most favorable to Petitioners, their record evidence consisted of testimony from several witnesses who described a long-term, recurring problem in Volusia County involving deputies indiscriminately speeding when not in pursuit or answering an emergency call. Each independently witnessed Volusia County sheriff's deputies over many years routinely exceeding the speed limit while not on emergency calls. They had been alarmed by the deputies' speed on many occasions, even fearing for their own safety. The deputies do this on various roadways, including Highway 11 where the accident took place. One witness even wrote a letter to the editor of one of the local newspapers about the problem, stating that the "stretch of road called International Speedway Boulevard is truly a raceway for the sheriff's department vehicles."

After reviewing voluminous testimony and Volusia County records, Petitioners' police practices expert witness testified that this crash wasn't an isolated incident or

unusual behavior for the Volusia County sheriff's office. He stated, *inter alia*, that: (1) the Volusia County sheriff's department knew or should have known that deputies exceeded the speed limit or otherwise engaged in dangerous driving practices and, consequently, are disproportionately at risk of becoming involved in accidents; (2) Volusia County sheriff's deputies indiscriminately used speed in their day-to-day duties or otherwise engaged in dangerous driving practices; (3) Volusia County failed to initiate and maintain reasonable policies relevant to poor driving performance that would stop the dangerous conduct; and (4) this collective activity led to an environment where deputies were not held accountable for these dangerous driving practices, they knew it, and that made Watson's accident with the Rooneys foreseeable as well as preventable. He also testified that the weapons police officers utilize in their day-to-day tasks are guns and vehicles, and that a police vehicle greatly exceeding the speed limit without lights or sirens is more dangerous because the other drivers are not on notice (by the lights and sirens) of the vehicle's speed.

Petitioners' record testimony also showed that no deputy had been trained in the use of his police vehicle in rookie school. During attendance at police academy, none had received training regarding how to operate a police motor vehicle in emergencies, at high speeds or for special police work – or even for routine police work. They were given their badges, guns and cars, and sent out on the road.

By 1975, former (late) Sheriff Edwin H. Duff II recognized that "[a]ccidents envolving [sic] police vehicles are costing law enforcement agencies a substantial amount in

personal injuries to officers, loss of productive time, repair costs to vehicles, as well as personal injury and property damage to others." Again, in 1977, Duff acknowledged an increase in law enforcement accident rates and sought a grant to construct and run an Emergency Vehicle Operations Course. In the documentation supporting the proposal, Duff wrote:

> "The National Highway Traffic Safety Administration estimates that of 250,000 high-speed police pursuits every year, nearly 8,000 end in crashes, with some 400 people killed and 5,000 injured." [footnote omitted]
>
> Statistics further indicate that the likelihood of a law enforcement patrol vehicle being involved in a *non-pursuit* accident is even greater. . . . [emphasis in original]

With this knowledge in hand, Volusia County established an Emergency Vehicle Operations Course (EVOC). This was a course purportedly designed to train law enforcement officers how to operate their vehicles – except they were *not* taught high-speed driving. The exercises they participated in were low-speed (25-30 mph), high-maneuverability. The course was devoid of any training for use of law enforcement vehicles at high speeds.

George Watson had taken this course twice – the first time while employed by a prior police department after he had an accident with his law enforcement vehicle, the second time after being hired by Volusia County. Nonetheless, Watson had two more auto accidents with his Volusia County patrol vehicle after taking the EVOC courses, one prior to the one with the Rooneys and the

one involving the Rooneys. After the Rooney accident, he was not disciplined; rather, he was given a promotion to the detective bureau.

Petitioners' police practices expert witness also testified, in addition to the matters discussed above, that Volusia County failed to properly train their deputies in the use of their vehicles, particularly at high speeds.

In summary, in the light most favorable to Petitioners, the record evidence showed that a law enforcement officer was on a routine patrol, not in pursuit or responding to an emergency; he was exceeding the speed limit by 50 percent for no legitimate reason, and was not utilizing lights or sirens to indicate his high speed; he had been involved in prior accidents with his patrol vehicles; his high-speed behavior was persistent and widespread in his department, and such behavior, because of the agency's lack of discipline for engaging in it, was essentially encouraged by the department; he was following that persistent and widespread policy that night; his department failed to train him in the use of that vehicle at such excessive, dangerous speeds; and all of the foregoing led to the crash with the Rooneys. These are the general facts upon which Petitioners' civil rights claim were based, and which supported their position on summary judgment below.

C. The Proceedings Below

The district court found, under the facts of this case and the First Amended Complaint, that Petitioners did not suffer a "constitutional deprivation". Relying upon *Cannon v. Taylor*, 782 F.2d 947 (11th Cir. 1986), the court

stated that Deputy Watson's "negligence or even gross negligence" was insufficient to give rise to § 1983 liability; that the "custom or policy" and "failure to train" evidence in this case was of no import or consequence because there was no constitutional violation in the first place. App. 14. The district court entered summary judgment in favor of the defendants on the § 1983 claim, and declined to exercise supplemental jurisdiction over the remaining state law claim.

The Eleventh Circuit upheld this decision in all respects, finding that inquiries into "custom and policy" or "failure to train" would only be relevant when a constitutional deprivation has occurred; since the deputy's conduct in this case did not cause the Petitioners to suffer a constitutional deprivation, there was no need to make the inquiry. App. 7, 9.

REASONS WHY CERTIORARI SHOULD BE GRANTED

The opinion of the Eleventh Circuit conflicts with prior decisions of this Court and other Circuits, creating confusion and lack of uniformity in the treatment of these issues. Consequently, this case presents the Court with an opportunity to clarify these issues and provide guidance for litigants nationwide. Additionally, this court has already granted review in a similar case, *County of Sacramento, Sacramento County Sheriff's Department and James Everett Smith, Petitioners, vs. Teri Lewis and Thomas Lewis, Personal Representative of the Estate of Philip Lewis, Respondents,* No. 96-1337, and a grant of review in this case will

give the court the rare opportunity to resolve related issues of supreme national importance at one time.

I.

Review is warranted because the opinion of the Eleventh Circuit conflicts with prior decisions of this Court and the Third, Fourth and Ninth Circuits (the last of which review is pending) on a significant matter of interpretation of 42 U.S.C. § 1983, i.e., whether a substantive due process violation exists when a deprivation of life and property occurs from a non-pursuit high-speed crash resulting from a governmental agency's "custom or policy" and/or "failure to train", and it is of national importance to create uniformity in the treatment of these cases.

The Eleventh Circuit's opinion flatly held that the Petitioners here did not suffer a constitutional deprivation, i.e., that the Rooneys were not deprived of any rights, privileges, or immunities guaranteed under the Constitution or laws of the United States. App. 9. Viewing the deputy's behavior as negligence or even gross negligence, the court found it did not have to reach the question of whether "custom or policy" and/or "failure to train" prompted the deputy's behavior to comprise the substantive due process violation. App. 7. That holding contradicts previous opinions of this Court and the Third, Fourth and Ninth Circuits. The practical effect of the Eleventh Circuit's decision is to allow police agencies with such policies or customs and/or which do not properly train their officers to do so with federal impunity and no incentive to correct their conduct. More importantly, it creates confusion among the circuits because other circuits have found that a deprivation of life, liberty

or property resulting from an agency's "customs or policies" and/or "failure to train" constitutes a violation of substantive due process violations.

A. Custom or Policy

Since at least 1978, this court has acknowledged that local governments can be sued under 42 U.S.C. § 1983 for constitutional deprivations "visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decisionmaking channels." *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658, 691-692, 98 S.Ct. 2018, 2036 (1978). This Court also recognized, in 1981, that "life, liberty or property" losses which occur not in the vacuum of simple negligence, but rather as a result of "some established state procedure", are indeed cognizable due process violations under the Fourteenth Amendment. *Parratt v. Taylor*, 451 U.S. 527, 544, 101 S.Ct. 1908, 1917 (1981), *overruled in part, Daniels v. Williams*, 474 U.S. 327, 106 S.Ct. 662 (1986). This Court made it clear that a party involved in "nothing more than" an automobile accident with a state official, for example, could not suffer a Fourteenth Amendment deprivation. 451 U.S. at 544, 101 S.Ct. at 1917. Under *Parratt*, then, if the state procedure is what led to the accident, a Fourteenth Amendment violation would indeed exist. The Eleventh Circuit failed to follow this principle of law in the case below, refusing to acknowledge that the Rooneys' loss of life and property as a result of Volusia County's customs or policies was a substantive due process deprivation.

The *Parratt* holding was approved once again in *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 105 S.Ct. 2427 (1985), where this court reiterated the requirement that the municipal policy "must be 'the moving force of the constitutional violation' ". 471 U.S. at 821, 105 S.Ct. at 2434 (citing *Polk County v. Dodson*, 454 U.S. 312, 326, 102 S.Ct. 445, 454 (1981)). In this case the Rooneys' pleadings and record evidence show that Volusia County's customs and policies were what led to George Watson's high-speed conduct and, consequently, their loss of life and property.

Parratt was partially overruled by *Daniels v. Williams*, 474 U.S. 327, 106 S.Ct. 662 (1986), decided with the companion case of *Davidson v. Cannon*, 474 U.S. 344, 106 S.Ct. 668 (1986). In these cases, which tested the efficacy of the Due Process clause, this court said its role was to determine when tortious conduct rises to the level of a constitutional tort, or deprivation. *Daniels*, 474 U.S. at 329, 106 S.Ct. at 664. In *Daniels*, the prisoner-plaintiff alleged he was deprived of "liberty without due process" of law when he slipped on a pillow negligently left on prison stairs. This court concluded that "the Due Process Clause is simply not implicated by a *negligent* act of an official causing unintended loss of or injury to life, liberty, or property." 474 U.S. at 329, 106 S.Ct. at 663. Adopting Justice POWELL'S concurrence in *Parratt*, the court agreed that the word "deprive" in the Due Process Clause connotes more than a negligent act, and that the federal courthouse doors should not open to § 1983 lawsuits "where there has been no affirmative abuse of power." *Id.* On that basis, this court overruled that a portion of *Parratt* holding that mere lack of due care may constitute

a "life, liberty or property" deprivation under the Fourteenth Amendment.

In *Davidson*, the prisoner-plaintiff claimed he was deprived of his Fourteenth Amendment "liberty" interest when he suffered an attack by another inmate after informing prison officials he received a threat that he would be beaten. Once again characterizing the single incident as one lacking in due care, rather than approaching "the sort of abusive government conduct that the Due Process Clause was designed to prevent", 474 U.S. at 348 (citing *Daniels)*, this court refused to find a Fourteenth Amendment deprivation. Significantly, however, this Court stated that the *Davidson* facts were "quite different from one involving injuries caused by an unjustified attack by prison guards themselves . . . or by another prisoner where officials simply stood by and permitted the attack to proceed. . . . " *Id.* In this case, it could be said that the Rooney boys were unjustifiably "attacked" by George Watson's indiscriminate use of his vehicle, caused by Volusia County's custom or policy that essentially permitted this "attack" to occur.

The Eleventh Circuit, however, overlooked *Daniels* and *Davidson* and relied instead upon its 1986 decision in *Cannon v. Taylor,* 782 F.2d 947 (11th Cir. 1986), which was issued one month after those decisions and did not cite to either. In *Cannon*, the Plaintiff's decedent was an innocent motorist killed by a police officer responding to an emergency call in his patrol car. *Id.* at 948. Officer Taylor was in violation of department policy by not utilizing his lights and sirens during the emergency call. *Id.* The plaintiffs claimed the police officer violated the decedent's right to life without procedural due process, and that the

city did also via a policy that authorized police to drive at excessive speeds without lights and sirens and by failing to properly train their officers. *Id.* at 948-949. Regarding the claim against the individual officer, the Eleventh Circuit held that "a person injured in an automobile accident caused by the negligent, or even grossly negligent, operation of a motor vehicle by a policeman acting in the line of duty has no section 1983 cause of action for violation of a federal right." *Id.* at 950. As to the claim against the city, the court found the Plaintiff failed to establish record evidence showing officials "disregarded instances of officer misconduct which threatened or deprived the rights of city residents." *Id.* at 951.

As to simple negligence cases, *Cannon* has support in *Daniels* and *Davidson*. However, its applicability to substantive due process claims implicating "custom or policy" and/or "failure to train" is erroneous and contrary to this court's well-established precedent. Here, the Rooneys did not plead or show *a negligent act* of an official causing *unintended* loss of or injury to their lives and property. Nor did they plead it in the context of a solitary accident involving a sheriff's deputy. Rather, it has been pleaded, and proven through record evidence, in the context of an ongoing misuse of the weapons of governmental power. This case demonstrates a peace officer's abuse of police power, which came about as a result of his adherence to his department's policy of misuse of police power, which was so common and widespread that life and property deprivations were certain to result and did result (e.g., Deputy Watson's prior accidents and Sheriff Duff's acknowledgment of the injuries and damages associated with the ongoing problem of pursuit and

non-pursuit accidents), the Department knew or should have known of the consequences of this policy and had a duty to correct it, and it did not do so. These officials – entrusted with state law, wearing the badge of state law, and bound to enforce state law, violated state law – regularly and, up until now, with federal impunity. There is no clearer definition of abuse of power.

This court continued to acknowledge substantive due process violations stemming from abuses of governmental power in cases from 1990 and 1992. In *Zinermon v. Burch*, 494 U.S. 113, 110 S.Ct. 975 (1990), this court returned to its roots in *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473 (1961), reiterating that that decision rejected the view that § 1983 does not reach abuses of state authority. 494 U.S. at 124, 110 S.Ct. at 982. The Fourteenth Amendment does indeed bar "certain arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them.' " 494 U.S. at 125, 110 S.Ct. at 983 (citing *Daniels*, 474 U.S. at 331, 106 S.Ct. at 664). The circumstances of this case fall under that umbrella, and the Eleventh Circuit should have recognized that.

In *Collins v. City of Harker Heights, Texas*, 503 U.S. 115, 112 S.Ct. 1061 (1992), this court further stated that "[o]ur cases do not support the Court of Appeals' reading of § 1983 as requiring proof of an abuse of governmental power separate and apart from the proof of a constitutional violation." 503 U.S. at ___, 112 S.Ct. at 1065. Otherwise stated, the abuse of governmental power *is* the constitutional violation. The Eleventh Circuit, however, held that the Rooneys did not suffer a constitutional deprivation and, therefore, it need not reach the "custom

or policy" or "failure to train" issues. That decision requires the Rooneys to do just what *Collins* says they should not have to do: Show a constitutional violation separate and apart from the abuse of governmental power they pled and proved via Volusia County's "custom or policy" and/or "failure to train." Furthermore, the Eleventh Circuit's decision also leaves litigants in doubt as to what more than life and property deprivations must be shown in these cases. Its decision is in direct conflict with this court's principles of law.

The Eleventh Circuit's opinion on this point is also directly in conflict with two other Circuit Court opinions. The Fourth Circuit Court of Appeals, in *Revene v. Charles County Commissioners*, 882 F.2d 870 (4th Cir. 1989), found abuse of police power was a substantive due process violation under facts less compelling than those here. In *Revene*, a sheriff's deputy who was off duty, not in uniform, and driving his personal vehicle followed the Plaintiff's decedent to his home, got out of his vehicle, produced a handgun, pointed it at the decedent, and shot and killed him. There was no claim of a Fourth Amendment arrest or detention. The Fourth Circuit, reading the allegations as asserting the deputy was acting under color of state law[1] by conducting official police action, stated that these facts could be viewed "as consistent with an officer's '[m]isuse of power . . . possessed by virtue of state law,' which of course falls within § 1983." *Id.* at 873-874 (citing *Monroe v. Pape*, 365 U.S. at 183-186). Here, there is no question that Deputy Watson was on

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[1] Under county law there, deputies are considered on duty 24 hours a day. *Id.* at 873.

duty that night. Whether he misused his police power in the context of using his gun to injure the Petitioners or by using his cruiser to injure them is a distinction without significance: He misused his police power, depriving the Rooneys of life and property. The Fourth Circuit agreed that the civil rights claim in that case should not have been dismissed, and reinstated it along with the pendent state law claim, which arose from a common nucleus of operative fact. The Eleventh Circuit here disposed of it by entry of summary judgment, and dismissed the state law claim. The Circuits are in direct conflict and in need of clarification of this issue.

The Eleventh Circuit opinion also conflicts with *Lewis v. Sacramento County*, 98 F.3d 434 (9th Cir. 1996), which was decided 20 days earlier and is currently on review by this court. Quoting *Daniels*, the Ninth Circuit in *Lewis* recognized that when a law enforcement official "arbitrarily acts to deprive a person of life and personal security in the course of pursuing his official duties, constitutional due process rights may be implicated." *Id.* at 439. In that case, the police undertook a high-speed pursuit of two juveniles on a motorcycle whose only digression was to drive away from an officer who yelled at them. *Id.* at 436. Like the Rooney boys, they had not violated the law; unlike the Rooneys, they were the subjects of the high-speed pursuit rather than victims of high-speed custom or policy. One of the boys died, and his parents brought suit under 42 U.S.C. § 1983 and California's wrongful death act. Here, the two boys were grievously injured and they and their parents brought suit under 42 U.S.C. § 1983 and Florida common law

negligence pursuant to its waiver of sovereign immunity act. The Ninth Circuit in *Lewis* unequivocally found the "underlying constitutional rights at issue here are substantive due process rights to life and liberty or personal security." *Id.* at 439. The Eleventh Circuit here found there was no constitutional deprivation, adhering to *Cannon*, which was also a pursuit case that killed an innocent motorist.

The circuits are in direct conflict, and Petitioners implore this court to resolve it for the benefit of victims nationwide. The substantive due process violation in the Rooney case is no different from that of *Lewis*. The fact that the Lewis boy died as a result of a high-speed pursuit, and Keith and John Rooney were grievously injured as a result of a high-speed non-pursuit custom or policy is factually insignificant. Both deputies were utilizing their patrol cars on duty at high speed. Indeed, if anything, the Rooney case is more compelling because George Watson had *no reason* to do what he did; Deputy Smith of Sacramento had a colorable, albeit insufficient, reason to engage in his high-speed conduct.

B. Failure to Train

The Eleventh Circuit's refusal to recognize that failure to train constitutes a substantive due process violation also contradicts prior decisions of this court and decisions of the Third and Ninth Circuits.

This court first recognized municipal liability for failure to train under § 1983 in limited circumstances in *City of Canton, Ohio v. Harris*, 489 U.S. 378, 109 S.Ct. 1197 (1989). There, this court held that "the inadequacy of

police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come in contact." 489 U.S. at ___, 109 S.Ct. at 1204. In describing the circumstances under which a claim can be made, this court said:

> The issue in a case like this one, however, is whether that training program is adequate; and if it is not, the question becomes whether such inadequate training can justifiably be said to represent 'city policy'. . . . But it may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need. In that event, the failure to provide proper training may fairly be said to represent a policy for which the city is responsible, and for which the city may be held liable if it actually causes injury. . . . [T]he focus must be on adequacy of the training program in relation to the tasks the particular officers must perform.

489 U.S. at ___, 109 S.Ct. at 1205-1206. The Rooneys' complaint unequivocally pleads the requisites of *City of Canton*, App. 28, and their record evidence on summary judgment supports these claims. Volusia County knew its deputies would come in contact with others through the use of their vehicles at high speed, and it utterly failed to train them for that task. The Eleventh Circuit failed to follow this Court's precedent when it refused to recognize the Rooneys' life and property deprivations suffered

as a result of Volusia County's failure to train Deputy Watson in the use of his vehicle at high speeds as a substantive due process violation.

This court upheld the *City of Canton* police failure-to-train standards in an unsafe workplace case, although it refused to find a substantive due process violation in that particular case. *Collins*, 503 U.S. at ___, 112 S.Ct. at 1068. There, the plaintiff's decedent was killed after being ordered into an unsafe manhole to fix a sewer line. 503 U.S. at ___, 112 S.Ct. at 1064. The § 1983 claim alleged the Decedent had a substantive due process right to be adequately trained or warned about hazards in the workplace. *Id.* The complaint alleged the city violated those rights by its custom or policy of not training its employees about the dangers of working in sewer lines and manholes, not providing safety equipment, and not providing safety warnings. *Id.* Reiterating the rule of *City of Canton*, this court said "inadequate training of police officers could be characterized as the cause of the constitutional tort if – and only if – the failure to train amounted to 'deliberate indifference' to the rights of persons with whom the police come in contact." *Id.* at 1068. This Court then distinguished the *Collins* case from police cases and found no constitutional deprivation there. The Rooney case is a police failure-to-train case, and it falls squarely under the rule in *City of Canton*. The Eleventh Circuit, however, refused to even consider this claim, requiring the Rooneys to set forth a constitutional deprivation separate and apart from Volusia County's failure to train.

The Eleventh Circuit opinion here also conflicts with those of two Circuits, the Third and the Ninth. In *Fagan v.*

City of Vineland, 22 F.3d 1283 (3rd Cir. 1994), *on rehearing en banc*, 22 F.3d 1296 (3rd Cir. 1994), the court held a city could be liable for a substantive due process violation if its policymakers,

> acting with deliberate indifference, implemented a policy of inadequate training and thereby caused the officers to conduct the pursuit in an unsafe manner and deprive the plaintiffs of life or liberty. . . . If it can be shown that the plaintiff suffered that injury, which amounts to a deprivation of life or liberty, because the officer was following a city policy reflecting the city policymakers' deliberate indifference to constitutional rights, then the City is directly liable under section 1983 for causing a violation of the plaintiff's Fourteenth Amendment rights.

22 F.3d 1292. Thus, if the city's failure to train causes an officer to deprive a plaintiff of his life, liberty or property, the city has violated the plaintiff's Fourteenth Amendment rights. *Id.* Even though the Rooney incident did not result from a high-speed pursuit, it resulted from inappropriate high-speed conduct, the reason for engaging in which is less compelling. The Eleventh Circuit's opinion is directly in conflict with this principle of law by its failure to recognize the Rooneys' life and property deprivations in the context of Volusia County's failure to train.

The Ninth Circuit in *Lewis* also recognized a municipality's failure to train its police officers constituted a substantive due process violation. 98 F.3d at 438. Like the Rooney case, the *Lewis* case did not implicate the Fourth or Eighth Amendments, although it did implicate the officer's use of his vehicle at high speed. In the *Lewis* case, the trial court's entry of summary judgment for the

agency on the failure-to-train claim was upheld. The Ninth Circuit found that, because the deputy there did indeed receive training in the use of his vehicle at high speeds, albeit not specifically for high-speed pursuits, the sheriff's department procedures were not deliberately indifferent. *Id.* at 446. Volusia County, on the other hand, utterly failed to train its deputies in the use of their vehicles at high speeds, knowing full well that such indiscriminate use of its vehicles was taking place and causing injury. The Eleventh Circuit's failure to follow this principle of law places its decision in direct conflict with the Ninth Circuit in *Lewis*.

Petitioners respectfully submit that the proper legal principle recognizes deprivations of life, liberty or property resulting from governmental customs or policies and/or failure to train as substantive due process violations. The Eleventh Circuit's opinion holding otherwise is not only in error, but places the circuits at odds. The foregoing arguments illustrate the state of confusion in the Circuits and a desperate need for clarity nationwide on these important principles of law. That the court has already granted review in a similar case, *Lewis*, demonstrates the supreme importance of these issues. This case gives the court the additional opportunity to provide the direction needed in both pursuit and non-pursuit cases. Petitioners respectfully request this court avail itself of the opportunity presented.

CONCLUSION

Based on the foregoing, Petitioners respectfully submit that this petition for writ of certiorari should be granted.

Respectfully submitted,

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Dated: August 19, 1997

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John ROONEY, III, John Rooney, Jr., Marsha Rooney, Keith Rooney, By and Through his Next Best Friend, John Rooney, Jr., his father, Plaintiffs-Appellants,

v.

George Lee WATSON, individually and in his official capacity, County of Volusia, Defendants-Appellees,

Department of Public Safety, Volusia Co., Defendant.

No. 95-2255.

United States Court of Appeals,
Eleventh Circuit.

Dec. 26, 1996.

Motorists who collided with deputy sheriff while he drove at high rate of speed in nonemergency, nonpursuit situation brought § 1983 action against deputy and county. The United States District Court for the Middle District of Florida, No. 93-32-CIV-ORL-22, Anne C. Conway, J., granted summary judgment for defendants. Plaintiffs appealed. The Court of Appeals, Hatchett, Chief Judge, held that deputy's conduct, even if grossly negligent, did not result in constitutional deprivation.

Affirmed.

ANDERSON, Circuit Judge, issued concurring opinion.

Before HATCHETT, Chief Judge, ANDERSON, Circuit Judge, and WOOD*, Senior Circuit Judge.

HATCHETT, Chief Judge.

Following *Cannon v. Taylor*, 782 F.2d 947 (11th Cir.1986), the court affirms the district court's granting of summary judgment to a county and a deputy sheriff after finding that no constitutional deprivations resulted from an automobile accident.

BACKGROUND

On January 23, 1989, John Rooney III was driving his parents' truck, and his younger brother, Keith Rooney, was a passenger. George Watson, a deputy sheriff in Volusia County, Florida, while on duty, was driving his patrol vehicle southbound on Highway 11 traveling at approximately 82 miles per hour. The Rooneys were traveling northbound on Highway 11 and at Reynolds Road attempted to make a left turn. Watson's patrol vehicle struck the Rooneys' vehicle. At the time of impact, Watson's vehicle was traveling approximately 73 miles per hour. Watson was neither engaged in a police pursuit nor responding to an emergency call, and he did not have his lights or sirens operating. As a result of the accident, Keith Rooney sustained severe head injuries and John Rooney sustained bodily injuries and lost teeth. Watson was not seriously injured.

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* Honorable Harlington Wood, Jr., Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

On January 14, 1993, John Rooney, Jr., Marsha Rooney, John Rooney III, and Keith Rooney filed suit against Deputy Watson and Volusia County claiming constitutional violations under § 1983 and state law negligence claims. Following the completion of discovery, the appellees moved for summary judgment. The district court granted the appellees' motions for summary judgment on the federal civil rights counts on January 23, 1995, and in the same order declined to exercise supplemental jurisdiction over the state law claims. In granting the appellees' motions for summary judgment, the district court relied on *Cannon v. Taylor*, 782 F.2d 947 (11th Cir.1986).

CONTENTIONS

The Rooneys contend that Watson's conduct amounted to a constitutional deprivation. They argue that their case is distinguishable from *Cannon* because Volusia County had a *de facto* custom and policy that encouraged indiscriminate speeding and grossly negligent driving. They assert that Keith Rooney was deprived of a normal life, John Rooney III was deprived of a normal life, and John, Jr. and Marsha Rooney were deprived of their property, the truck, due to Volusia County's longstanding policy of allowing recklessness in the operation of patrol vehicles.

The Rooneys claim that the distinction between their case and "police-chase" cases that refused to find a constitutional violation is that this was not a "police-chase" case. In this case, Deputy Watson was not engaged in any pursuit of any kind. They contend that Volusia County's

refusal to prevent reckless driving among patrol vehicles could have led a reasonable jury to find that it amounted to a deliberate indifference to the rights of third parties. They also argue that the district court confused the role of custom and policy in this allegation with the separate claim against Volusia County for failure to properly train and supervise, and as a result, the district court reached the wrong result. The Rooneys assert that the trial court failed to make the distinction between their claim for deprivation of life, liberty and property through a policy or custom, and their claim for deprivation of their constitutional rights through a failure to train or supervise. They contend that the Supreme Court recognized a "failure to train" as a cognizable civil rights claim in *City of Canton v. Harris*, 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989).

Watson and Volusia County contend that the district court properly granted summary judgment to them because the Rooneys failed to prove a constitutional deprivation actionable under section 1983. They argue that in order for the Rooneys to state a claim they must prove that a statute, ordinance, custom or policy of the government caused the government officer or employee to violate another's constitutional rights. Moreover, they argue that Deputy Watson was not a policy maker for Volusia County; that the Rooneys' claim of deprivation of substantive or procedural due process is not triggered by mere negligence; that Deputy Watson's actions cannot rise to an unreasonable seizure in violation of the Fourth Amendment; and that under this court's decision in *Cannon v. Taylor*, 782 F.2d 947 (11th Cir.1986), a negligent or even grossly negligent operation of a motor vehicle by a

policeman acting in the line of duty does not give rise to a cause of action for violation of a federal right under section 1983.

ISSUE

The sole issue we address in this appeal is whether the district court erred in granting summary judgment to the appellees in finding that no constitutional deprivation occurred.

DISCUSSION

Our review of a district court's decision to grant summary judgment is *de novo*. *Hale v. Tallapoosa Co.*, 50 F.3d 1579 (11th Cir.1995). We independently review the record to determine whether summary judgment was appropriate viewing the pleadings, depositions, answers to interrogatories and admissions on file together with affidavits, if any, to determine whether a genuine issue of material fact exists and whether the moving party is entitled to judgment as a matter of law. *Celotex v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). In making our determination, we view the record in the light most favorable to the nonmoving party and with all reasonable inferences resolved in their favor. *Hale*, 50 F.3d at 1581.

I. Deputy Watson

The Rooneys brought this action under 42 U.S.C. § 1983 claiming that both Deputy Watson and Volusia County violated their constitutional rights to life, liberty,

property, procedural due process and travel under the United States Constitution. In order for the Rooneys to state a cause of action against Watson in his official capacity, we must determine (1) whether Watson's conduct alleged to have caused their harm occurred while he was acting under color of state law, and (2) whether his alleged conduct deprived the Rooneys of rights, privileges, or immunities guaranteed under the Constitution or laws of the United States. *Parratt v. Taylor*, 451 U.S. 527, 535, 101 S.Ct. 1908, 1912-13, 68 L.Ed.2d 420 (1981), *overruled on other grounds by, Daniels v. Williams*, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986); *see also Burch v. Apalachee Community Mental Health Servs., Inc.*, 840 F.2d 797, 800 (11th Cir.1988), *aff'd by, Zinermon v. Burch*, 494 U.S. 113, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990).

Our decision in *Cannon v. Taylor*, 782 F.2d 947 (11th Cir.1986), directs our analysis in this case. In *Cannon*, a police officer responding to a disturbance call at a local pool hall in Columbus, Georgia, struck another vehicle, killing the driver of that vehicle. When responding to the call, the officer had neither his flashing lights nor siren activated even though he was traveling sixteen miles over the speed limit. Under Georgia law, at the time of the accident, police officers responding to emergency calls were allowed to exceed posted speed limits as long as they used their vehicles' flashing lights and siren. The decedent's family filed suit under 42 U.S.C. § 1983 claiming that the police officer and the city of Columbus deprived the decedent of her life without due process of the law through reckless and excessive speeding without the use of lights and sirens. In that decision, this court held "that a person injured in an automobile accident

caused by the negligent, or even grossly negligent, operation of a motor vehicle by a policeman acting in the line of duty has no section 1983 cause of action for violation of a federal right." *Cannon*, 782 F.2d at 950. In reaching that conclusion, this court noted that it could not find any cases supporting the proposition that a police officer's negligence in operating his vehicle deprives an injured person of due process of law and that "automobile negligence actions are grist for the state law mill. But they do not rise to the level of a constitutional deprivation." *Cannon*, 782 F.2d at 949-50.

Under our reasoning in *Cannon*, Deputy Watson's single accident, whether we characterize it as negligence or even gross negligence causing the Rooneys' harm, does not amount to a constitutional deprivation. Although Watson was not responding to an emergency call, we believe *Cannon*'s holding dictates the result we reach. In this case, Watson was on duty and on patrol at the time of the accident. Under the reasoning of *Cannon*, we do not believe that any alleged negligence on Deputy Watson's part amounts to a constitutional deprivation simply because he was speeding in the absence of an emergency response or police pursuit. Perhaps his driving at a high rate of speed in a non-emergency or non-pursuit situation reveals gross negligence rather than negligence, but it does not transform a state tort claim into a constitutional deprivation under the circumstances of this case. Therefore, in the absence of a constitutional

deprivation, the Rooneys cannot sustain a cause of action against Watson under section 1983.[1]

II. County of Volusia

The Rooneys also assert that Volusia County maintained a custom or policy of allowing patrol vehicles to drive recklessly. Consequently, they argue that they should be able to establish their section 1983 claim based upon Volusia County's custom or policy that led to their constitutional deprivation. As the district court correctly pointed out, an inquiry into a governmental entity's custom or policy is relevant only when a constitutional deprivation has occurred.[2] *See Vineyard v. County of Murray, Ga.*, 990 F.2d 1207, 1211 (11th Cir.), *cert. denied*, 510 U.S. 1024, 114 S.Ct. 636, 126 L.Ed.2d 594 (1993).[3] Since we have determined that Deputy Watson's conduct did not cause the Rooneys to suffer a constitutional deprivation, we need not inquire into Volusia County's policy and custom relating to patrol vehicle operation and training. *See Los Angeles v. Heller*, 475 U.S. 796, 799, 106 S.Ct. 1571,

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[1] The Rooneys may still maintain a cause of action under state law against Deputy Watson.

[2] The Rooneys also allege that Volusia County's failure to train officers for high speed vehicle operation leads to a cognizable cause of action under section 1983. The Rooneys cannot maintain this cause of action, however, because the automobile accident did not rise to a level of violating their constitutional rights.

[3] In *Vineyard*, we stated that "[o]nly when it is clear that a violation of specific rights has occurred can the question of § 1983 municipal liability for the injury arise." *Vineyard*, 990 F.2d at 1211.

1573, 89 L.Ed.2d 806 (1986) (finding that a departmental policy or regulation authorizing the use of constitutionally excessive force is not relevant when a person has not been deprived of a constitutional right as a result of actions taken by an individual police officer); *see also Roach v. City of Fredericktown, Mo.*, 882 F.2d 294, 297-98 (8th Cir.1989) (finding that a municipality may be held liable under section 1983 for inadequate training only after determining that the plaintiff has suffered a constitutional deprivation as a result of the municipal employee's conduct). Therefore, our finding that the Rooneys did not suffer any constitutional deprivation makes it unnecessary to consider Volusia County's policy or custom.[4]

CONCLUSION

Because we have determined that Deputy Watson's conduct did not deprive the Rooneys of any constitutional right, they cannot maintain a cause of action under section 1983. The district court's decision granting Deputy Watson's and the County of Volusia's motions for summary judgment is affirmed.

AFFIRMED.

ANDERSON, Circuit Judge, concurring:

I concur in the judgment. For the reasons indicated in Judge Hatchett's opinion, I agree that Deputy Watson did

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[4] A similar result obtains with respect to the Rooneys' other theories of liability based on a failure to train and unreasonable seizure.

not violate plaintiffs' constitutional rights. I also conclude that Volusia County did not violate plaintiffs' constitutional rights. I note that plaintiffs' only argument with respect to lack of training is the lack of high speed training *on the range*. However, I do not think that the lack of training on the range could be a contributing cause in this case. Deputy Watson did not lose control. Rather, the only possible causes of this accident are readily subject to training in the classroom (e.g., the obvious dangers of high speeds, especially at night, and in view of oncoming traffic). I note also that plaintiffs' evidence about speeding was vague and unhelpful and could not constitute the basis of liability on the county's part for a constitutional violation. In view of the evidence proffered by the plaintiffs in this summary judgment record, I readily conclude that plaintiffs have failed to show that Volusia County was deliberately indifferent in any manner that could have caused the accident.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

KEITH ROONEY,
etc., et al.,

Plaintiffs,

-vs- CASE NO. 93-32-CIV-ORL-22

GEORGIE LEE WATSON,
etc., et al.,

Defendants.
_____/

ORDER

(Filed Jan. 23, 1995)

This cause comes before the Court for decision on various pending motions. The Court has considered such motions, and issues the following rulings thereon.

Defendants' Motions for Summary Judgment

Plaintiffs Keith Rooney and John Rooney III were injured when the vehicle they were occupying was involved in a traffic accident with a sheriff's patrol vehicle driven by Defendant George Lee Watson. The accident occurred on the evening of January 23, 1989. Watson was "on duty" as a deputy sheriff at the time of the collision. It is undisputed that he was neither engaged in a police pursuit, nor responding to an emergency call. It is also undisputed that he was not operating his emergency lights and siren. The Rooneys' vehicle was struck when it turned left into the path of Watson's oncoming vehicle.

Plaintiffs' accident reconstructionist opines that Watson's vehicle was travelling approximately 82 m.p.h. prior to the collision, reduced to approximately 73 m.p.h. at the time of impact. Deposition of Joseph Wattleworth, Ph.D. (Dkt. 150) at 86. The speed limit was 55 m.p.h. at the site of the accident.

In their First Amended Complaint (Dkt. 88), Plaintiffs have asserted a federal civil rights count pursuant to 42 U.S.C. § 1983, and a supplemental state law negligence count under *Fla. Stat.* § 768.28. The pleading names as defendants Deputy Watson, individually and in his official capacity, and the County of Volusia.

The Defendants have moved for summary judgment on various bases. In connection with these Motions, the Court deems it necessary to consider only a single question: On the undisputed facts, does Deputy Watson's conduct amount to a constitutional deprivation, actionable under § 1983? The court concludes that this question must be answered in the negative.

Resolution of the issue is governed by *Cannon v. Taylor*, 782 F.2d 947 (11th Cir. 1986). In *Cannon*, a police vehicle responding to a disturbance call struck another vehicle. An occupant of the latter vehicle was killed. At the time of the accident, the police vehicle was travelling, without flashing lights and siren, at least 46 m.p.h. in a 30 m.p.h. speed zone. The plaintiffs alleged that the police officer "deprived [the decedent] of her life without due process of law by virtue of his reckless, excessive speeding without the use of lights and sirens." *Cannon*, 782 F.2d at 948-49.

After reviewing Supreme Court precedent, the Eleventh Circuit held that "a person injured in an automobile accident caused by the negligent, or even grossly negligent, operation of a motor vehicle by a policeman acting in the line of duty has no section 1983 cause of action for violation of a federal right." *Id.* at 950. The court elaborated by stating:

> The type of negligence alleged in this case may well be actionable under state law. Automobile negligence actions are grist for the state law mill. But they do not rise to the level of a constitutional deprivation.

Id. (citation omitted).

The circumstances surrounding the accident in the instant case are materially indistinguishable from those in *Cannon*. That Deputy Watson's negligence, or even gross negligence, may have caused the accident is insufficient to give rise to § 1983 liability.[1] In light of *Cannon*, Deputy Watson's conduct simply is not actionable under § 1983.

In opposing the defense motions for summary judgment, Plaintiffs rely extensively on "custom or policy" evidence. However, a governmental entity's custom and policy is pertinent only when there has been a constitutional violation. *See Vineyard v. County of Murray, Ga.*, 990 F.2d 1207, 1211 (11th Cir. 1993) ("Only when it is clear that a violation of specific rights has occurred can the question of § 1983 municipal liability for the injury

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[1] Presumably, an allegation that Deputy Watson acted recklessly would not alter this result, since the plaintiffs in *Cannon* made such an allegation against the police officer in that case.

arise"). Since *Cannon* compels the conclusion that Deputy Watson did not violate the Rooneys' constitutional rights, the County of Volusia's policies concerning operation of patrol vehicles, and training in the operation of those vehicles, are immaterial. *See Los Angeles v. Heller,* 475 U.S. 796, 799 (1986) (*per curiam*) ("If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have **authorized** the use of constitutionally excessive force is quite beside the point")[2]; *see also, Temkin v. Frederick County Com'rs,* 945 F.2d 716, 724 (4th Cir. 1991) ("A claim of inadequate training under section 1983 cannot be made out against a supervisory authority absent a finding of a constitutional violation on the part of the person being supervised"), *cert. denied,* 112 S.Ct. 1172 (1992); *Roach v. City of Fredericktown, Mo.,* 882 F.2d 294, 297-98 (8th Cir. 1989) (In order for a municipality to be liable under § 1983 for inadequate training, "there must first be an underlying violation of the plaintiff's constitutional

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[2] Despite determining that no constitutional violation had occurred, the Eleventh Circuit in *Cannon* nevertheless went on to address the municipality's "custom or policy" liability under § 1983. The appellate court affirmed the district court's ruling in favor of the city on that issue. The fact that the court in *Cannon* separately addressed the municipality's § 1983 liability does not alter this Court's conclusion that an underlying constitutional violation is a necessary predicate to governmental "custom or policy" liability under § 1983. *Cannon* predated *Heller,* so the Eleventh Circuit did not have the benefit of the Supreme Court's reasoning on the subject at the time it decided *Cannon.* Under *Heller,* once a court concludes that there was no constitutional violation, any separate analysis of a governmental entity's "custom or policy" liability is unwarranted.

rights by a municipal employee"); *Hinton v. City of Elmwood, Kan.*, 997 F.2d 774, 782 (10th Cir. 1993) ("A municipality may not be held liable [under § 1983] where there was no underlying constitutional violation by any of its officers"; citing *Heller*); *Thompson v. Boggs*, 33 F.3d 847, 858-59 and n. 11 (7th Cir. 1994) ("[J]ury verdict in favor of [police officer] on the question of whether he used excessive force precludes the possibility that [the plaintiff] could prevail" on his claim that a city and its police chief had a policy or custom of approving the officer's use of excessive force; citing *Heller*).[3]

For the foregoing reasons, the Defendants are entitled to summary judgment on the Plaintiffs' § 1983 claims (Count I of the First Amended Complaint).[4]

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[3] The Court declines to follow *Fagan v. City of Vineland*, 22 F.3d 1283, *on reh'g in part*, 22 F.3d 1296 (3d Cir. 1994), insofar as it stands for the proposition that a municipality can be held liable under § 1983 for failure to train its officers, even if no individual officer has violated the constitution. The Third Circuit's decision is contrary to the weight of authority and, more importantly, is inconsistent with *Heller*. *Fagan* and its rationale for distinguishing *Heller* have been flatly rejected in the recent decision of *Thompson v. Boggs*, 33 F.3d 847, 859 n. 11 (7th Cir. 1994). Additionally, for the reasons set forth in footnote 2 of this Order, *Fagan's* reliance on *Cannon's* discussion about municipality "custom or policy" liability is misplaced.

[4] In light of this conclusion, the Court need not address the Defendants' other summary judgment arguments directed at the § 1983 count.

Plaintiffs' State Law Claims

With the dismissal of the civil rights claims, the only claims remaining in this case are those seeking damages under state law for personal injury arising from a traffic accident. The Court must examine 28 U.S.C. § 1367, the statute governing supplemental jurisdiction, in order to determine whether to continue to exercise jurisdiction over the state claims.

Section 1367 provides, in pertinent part, as follows:

> (a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts shall have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.
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> * * *
>
> (c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if –
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> * * *
>
> (3) the district court has dismissed all claims over which it has original jurisdiction[.]
>
> * * *
>
> (d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal

> of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

It appears that the statute of limitations on the remaining state claims ran during the pendency of this suit. In light of that fact, before the advent of § 1367, it might have been an abuse of discretion for the Court to dismiss the state claims on the ground that the Court no longer had jurisdiction over the federal claim. *See Edwards v. Okaloosa County*, 5 F.3d 1431 (1993), *modified on denial of reh'g*, 23 F.3d 358 (11th Cir. 1994). However, such is no longer the case. Under § 1367(d), the statute of limitations on the state claims is tolled until 30 days after the date of this Order. *See U.S. Anchor Mfg., Inc. v. Rule Industries, Inc.*, 7 F.3d 986, 1005 (11th Cir. 1993) ("Under . . . § 1367(d), the statute of limitations would be tolled while the claims were pending until 30 days after an order of dismissal, thus allowing the plaintiff time for filing a new action in state court without the lapse of its rights"), *cert. denied*, 114 S.Ct. 2710 (1994); *Edwards*, 5 F.3d at 1433 n. 1; *Winn v. North American Phillips Corp.*, 826 F.Supp. 1424, 1427 n. 3 (S.D. Fla. 1993). Accordingly, the Plaintiffs will not be prejudiced from a statute of limitations standpoint by dismissal of the state claims.

This case has been pending for slightly more than two years. The complaint was filed in January 1993. In February 1994, the Court entered an Order (Dkt. 86) granting Plaintiffs leave to file an amended complaint. That Order further stated:

> The Court cautions the plaintiffs, and their counsel, however, that the Court is concerned

> whether plaintiff can assert a viable 42 U.S.C. § 1983 claim, so as to give the Court a basis for federal jurisdiction, in light of *Cannon v. Taylor*, 782 F.2d 947 (11th Cir. 1986) (person injured in automobile accident caused by negligent, or even grossly negligent, operation of motor vehicle by police officer acting in line of duty has no section 1983 cause of action for violation of federal right), and *Los Angeles v. Heller*, 475 U.S. 796, 799 (1986) (if police officer has not inflicted constitutional harm, municipality not liable for damages under section 1983; if person has suffered no constitutional injury at hands of individual police officer, fact that departmental regulations might have authorized use of constitutionally excessive force "is quite beside the point"). Accordingly, plaintiffs and their counsel must factor *Cannon* and *Heller* into their decision whether to file and serve an amended complaint.

Dkt. 86 at 2.

The authorities cited in the February 1994 Order are the same as those cited in this Order as the basis for granting Defendants summary judgment on the § 1983 count. Hence, even though the case has been pending for just over two years, the Plaintiffs were warned slightly more than a year after it was commenced that the Court might not have jurisdiction over the only federal claim they were asserting. Under these circumstances, the Court determines that the Plaintiffs will not be unfairly prejudiced by the dismissal of state claims that have been

pending in this court slightly more than two years, particularly since they will be able to refile the lawsuit in state court.[5]

Based on the foregoing discussion, and in light of the fact that the remaining state claims are of a type considered "grist for the state law mill", the Court determines that it should decline to exercise supplemental jurisdiction pursuant to § 1367(c)(3).[6]

Plaintiffs' Motion for Leave to Amend

Plaintiffs have filed a motion seeking leave to file a second amended complaint. The proposed pleading adds allegations of improper hiring, retention and supervision in the § 1983 count, and asserts an entirely new state law claim of negligent hiring and retention.[7]

The amendment to the civil rights count would be futile. Since the Court has determined, as a matter of law, that the conduct of Deputy Watson did not give rise to a constitutional violation, allegations that the County of Volusia improperly hired, retained and supervised him are no longer relevant to the § 1983 count. Moreover, the addition of the new state law cause of action would not

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[5] In this connection, the Court also finds significant that the Plaintiffs waited until nearly four years after the accident to commence this suit.

[6] In view of this conclusion, the Court will not reach the Defendants' summary judgment arguments directed at the state law claims.

[7] The proposed second amended complaint also corrects the Plaintiffs' city of residence.

alter the Court's decision not to exercise supplemental jurisdiction. In other words, the Court would dismiss the remaining state law claims even if they included those sought to be added.

For these reasons, the Court determines that leave to amend should not be granted.

Sufficiency of Summary Judgment Affidavits

Plaintiffs have filed a Motion (Dkt. 200) to strike certain affidavits filed by the County of Volusia in support of its motion for summary judgment. The County has responded by, *inter alia*, seeking leave to amend the challenged affidavits. *See* County of Volusia's Response to Plaintiffs' Motion to Strike and in the Alternative Motion to Amend Affidavits (Dkt. 202). The subject affidavits relate solely to the "custom or policy" issue, which the Court need not reach. Accordingly, both Motions will be denied as moot.

Conclusion

Based on the foregoing, it is ORDERED as follows:

1. Plaintiffs' Motion for Leave to Amend Complaint (Dkt. 102), filed July 8, 1994, is DENIED.

2. Plaintiffs' Motion to Strike Defendant Volusia County's Affidavits (Dkt. 200), filed December 9, 1994, is DENIED AS MOOT.

3. Insofar as it seeks leave to amend certain affidavits, Defendant County of Volusia's Response to Plaintiffs' Motion to Strike and in the Alternative Motion to

Amend affidavits (Dkt. 202), filed December 16, 1994, is DENIED AS MOOT.

4. Defendant County of Volusia's Motion for Summary Judgment Re: Count I of Plaintiff's Amended Complaint for Civil Rights Violation and for Personal Injuries (Dkt. 138), filed October 28, 1993, is DENIED AS MOOT, in light of the later-filed amendment (Dkt. 186) to such Motion.

5. The following Motions are GRANTED insofar as they seek summary judgment on the basis that Deputy Watson's conduct did not amount to a constitutional violation, actionable under 42 U.S.C. § 1983:

a. Defendant County of Volusia's Amended Motion for Summary Judgment Re: Count I of Plaintiffs' Amended Complaint for Civil Rights Violation and for Personal Injuries (Dkt. 186), filed November 16, 1994;

b. Defendant George Lee Watson's [Individual Capacity] Motion for Summary Final Judgment (Dkt. 176), filed October 28, 1994; and

c. Defendant George Lee Watson's [Official Capacity] Motion for Summary Judgment Re: Plaintiffs' Amended Complaint for Civil Rights Violation and for Personal Injuries (Dkt. 136), filed October 28, 1994.[8]

The Court does not reach the other summary judgment arguments advanced in these Motions.

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[8] The Memorandum (Dkt. 137) supporting this Motion expressly adopted the County of Volusia's summary judgment arguments.

6. The Clerk is directed to enter a judgment providing that the Plaintiffs shall take nothing on Count I of the First Amended Complaint, brought pursuant to 42 U.S.C. § 1983.

7. Plaintiffs' remaining claims, brought pursuant to *Fla. Stat.* 768.28 and set forth in Count II of the First Amended Complaint, are DISMISSED pursuant to 28 U.S.C. § 1367(c)(3).

8. Any other motions are DENIED AS MOOT.

9. The Clerk is directed to close this case.

DONE AND ORDERED in Chambers in Orlando, Florida, this 23rd day of January, 1995.

/s/ Anne C. Conway
ANNE C. CONWAY
United States
District Judge

Copies to: Counsel of Record
Judge's Secretary
Courtroom Deputy

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRUCIT

No. 95-2255

JOHN ROONEY, III; JOHN ROONEY, Jr.;
MARSHA ROONEY; KEITH ROONEY,
by and through his next best friend,
JOHN ROONEY, Jr., his father,

Plaintiffs-Appellants,

versus

GEORGE LEE WATSON, individually
and in his official capacity,
COUNTY OF VOLUSIA,

Defendants-Appellees.

DEPARTMENT OF PUBLIC
SAFETY, VOLUSIA CO.,

Defendant.

On Appeal from the United States District Court for the
Middle District of Florida

(Filed May 22, 1997)

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC (Opinion ___, 11th Cir., 19__, ___ F.2d ___).

Before: HATCHETT, Chief Judge, ANDERSON, Circuit Judge, and WOOD*, Senior Circuit Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Joseph W. Hatchett
CHIEF JUDGE

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*Honorable Harlington Wood, Jr., Senior U. S. Circuit Judge for the Seventh Circuit, sitting by designation.

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

KEITH ROONEY, by and through his next best friend, JOHN ROONEY, JR., his father; JOHN ROONEY, III; JOHN ROONEY, JR.; and MARSHA ROONEY, his wife,

Plaintiffs,

vs.

GEORGE LEE WATSON, individually and in his official capacity, and the COUNTY OF VOLUSIA,

Defendants.
_____/

CASE NO.: 93-32-CIV-ORL-22

CIVIL DIVISION

FIRST AMENDED COMPLAINT FOR CIVIL RIGHTS VIOLATIONS AND FOR PERSONAL INJURIES

Plaintiffs, KEITH ROONEY, by and through his next best friend, JOHN ROONEY, JR., his father; JOHN ROONEY III; JOHN ROONEY, JR.; and MARSHA ROONEY, his wife, sue the Defendants, GEORGE LEE WATSON, individually and in his official capacity, and the COUNTY OF VOLUSIA and allege:

ALLEGATIONS COMMON TO ALL COUNTS

1. This action is a claim for damages in excess of $50,000, exclusive of interest, costs and attorneys fees, brought by Plaintiffs for violation of their civil rights

under 42 U.S.C. § 1983 and/or for personal injuries pursuant to *Fla. Stat.* § 768.28.

2. This Honorable Court has jurisdiction over the civil rights portion of this claim pursuant to 28 U.S.C. § 1343(a)(3) and 28 U.S.C. § 1331, as well as pendent jurisdiction over the personal injury count in this claim.

3. At the time the original Complaint was filed, Plaintiff, KEITH ROONEY ("KEITH"), was a minor residing with his parents, JOHN ROONEY, JR. and MARSHA ROONEY, in Deland, Volusia County, Florida. He brought this action by and through his next best friend, JOHN ROONEY, JR. At the time this First Amended Complaint is being filed, KEITH is of majority age and otherwise *sui juris*.

4. Plaintiff, JOHN ROONEY III ("JOHN III"), at all material times was a resident of Deland, Volusia County, Florida. He is *sui juris*.

5. Plaintiff, JOHN ROONEY, JR. ("JOHN JR."), at all material times was and is a resident of Deland, Volusia County, Florida, living in a marital relationship with his wife, MARSHA ROONEY. He is the father of Plaintiffs, KEITH and JOHN III.

6. Plaintiff, MARSHA ROONEY ("MARSHA"), at all material times was and is a resident of Deland, Volusia County, Florida, living in a marital relationship with her husband, JOHN JR. She is the mother of Plaintiffs, KEITH and JOHN III.

7. Defendant, GEORGE LEE WATSON ("WATSON"), at all material times was an employee of COUNTY OF VOLUSIA in the Department of Public

Safety, employed as a sheriff's deputy/law enforcement officer.

8. Defendant, COUNTY OF VOLUSIA ("VOLUSIA COUNTY"), at all material times was and is a political subdivision of the State of Florida pursuant to Article VIII, § 1(g), Florida Constitution. At all material times, Defendant WATSON was an employee of VOLUSIA COUNTY's Department of Public Safety.

9. On or about January 23, 1989, at about 9:05 p.m., the Plaintiffs, KEITH and JOHN III, were in a truck owned by their parents and driven by JOHN III with their parents' consent, traveling northbound on State Road 11 near Reynolds Road, Volusia County, Florida, and within the speed limit. Defendant WATSON was in a vehicle owned by Defendant VOLUSIA COUNTY traveling southbound on State Road 11 at a high rate of speed, far exceeding the speed limit of 55 miles per hour. Plaintiff, JOHN III, seeing headlights a considerable distance away but not knowing the oncoming car was speeding, attempted to turn left onto Reynolds Road, believing he had ample time to clear the intersection ahead of the approaching vehicle. Defendant WATSON, traveling at approximately 75 miles per hour without lights or sirens on, struck the ROONEYS' vehicle, grievously injuring the Plaintiffs.

10. All conditions precedent to bringing this action have been met; VOLUSIA COUNTY and Florida Department of Insurance were served with Notices of Intent to bring litigation pursuant to *Fla Stat.* § 768.28 within the statutorily required time period.

COUNT I

CIVIL RIGHTS VIOLATION, 42 U.S.C. § 1983

Plaintiffs reallege Paragraphs 1 through 10 as though fully set forth herein and further allege:

11. Deputy WATSON, at all material times, was in the course of his employment with VOLUSIA COUNTY and acting under color of state law.

12. Deputy WATSON, at all material times, was acting pursuant to a persistent and widespread practice of VOLUSIA COUNTY's Department of Public Safety, in which he and fellow VOLUSIA COUNTY employees operated their county vehicles, i.e., dangerous instrumentalities, with indiscriminate use of speed. Speeding by sheriff's deputies in VOLUSIA COUNTY for non-emergency matters, particularly without the use of lights or sirens, was a common and widespread practice of which the Defendant VOLUSIA COUNTY had actual or constructive knowledge and failed to correct, displaying a deliberate indifference toward police misconduct that had a tendency to violate, and did violate, citizens' civil rights. Additionally or in the alternative, VOLUSIA COUNTY improperly trained their deputies, including Defendant WATSON, in the use of their vehicles, particularly in the specific use and handling of the vehicles at high speeds. This policy of indiscriminate use of speed violated citizens' constitutional rights such that the need for further training was or should have been plainly obvious to VOLUSIA COUNTY policymakers who, at least until the time of this accident, were deliberately indifferent to the need.

13. Defendant VOLUSIA COUNTY'S tacit knowledge and approval of Defendant WATSON's indiscriminate use of high speed, and/or VOLUSIA COUNTY's failure to properly train deputies including WATSON in the proper use of their vehicles at high speeds, subjected the Plaintiffs to a deprivation of their rights to life, liberty and property; their rights to procedural due process; and their rights to travel protected by the privileges and immunities clause, all guaranteed by the United States Constitution.

14. This deprivation of Plaintiffs' civil rights has resulted in injuries and damage to the Plaintiffs, all in violation of 42 U.S.C. § 1983.

WHEREFORE, Plaintiffs demand judgment against the Defendants for damages, interest, costs and attorneys fees pursuant to 42 U.S.C. § 1983, and further demand trial by jury.

COUNT II

NEGLIGENCE, FLA. STAT. § 768.28

Plaintiffs reallege Paragraphs 1 through 10 as though fully set forth herein and further allege in addition, or in the alternative:

15. At the time and place described in Paragraph 9 above Defendant WATSON negligently operated or maintained the vehicle owned by Defendant VOLUSIA COUNTY so that it collided with Plaintiffs' motor vehicle.

16. As a result, Plaintiffs KEITH and JOHN ROONEY III suffered bodily injury and resulting pain and suffering, disability, disfigurement, mental anguish,

loss of capacity for the enjoyment of life, expense of hospitalization, medical and nursing care and treatment, loss of earnings, loss of ability to earn money and aggravation of a previously existing condition. Their losses are either permanent or continuing and Plaintiffs will suffer the losses in the future. Plaintiffs' automobile was also damaged and they lost the use of it during the period required for its repair or replacement.

17. As a further result, Plaintiffs JOHN JR. and MARSHA ROONEY suffered loss of their childrens' services and affections, loss of property, and all other damages they may claim as a matter of right.

WHEREFORE, Plaintiffs demand judgment for damages against Defendants and further demand trial by jury.

DATED: February 17, 1994.

JOANNE FANIZZA, ESQ.
FERRERO AND
MIDDLEBROOKS, P.A.
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BY: /s/ Joanne Fanizza
JOANNE FANIZZA,
ESQ.
Florida Bar # 746940

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent by U.S. mail to CHARLES TINDELL, ESQ., Tindell & Beck, 406 North Wild Olive Avenue, Post Office Box 5666, Daytona Beach, Florida 32118; and to TURA BROUGHTON, ESQ., Assistant County Attorney, 123 West Indiana Avenue, Deland, Florida 32720-4613, this 17th day of February, 1994.

By: /s/ Joanne Fanizza
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Florida Bar No. 746940
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Supreme Court, U.S.
FILED
OCT 6 1997
CLERK

(2)

No. 97-321

In The

Supreme Court of the United States

October Term, 1997

KEITH ROONEY, by and through his next best friend, JOHN ROONEY, JR., his father; JOHN ROONEY, III; JOHN ROONEY, JR.; and MARSHA ROONEY, his wife,

Petitioners,

v.

GEORGE LEE WATSON, individually and in his official capacity, and the COUNTY OF VOLUSIA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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44 pp

QUESTION PRESENTED FOR REVIEW

The Respondents disagree with Petitioners' QUESTION PRESENTED FOR REVIEW. The question raised by this case is:

> Whether the substantive due process element of the Fourteenth Amendment is implicated when physical injury and property damage result from a night-time intersectional vehicular accident which occurs after the claimant driver observes the illuminated headlights of an oncoming speeding vehicle, determines there is time to complete a left turn, and turns claimant's vehicle left into the path of the oncoming vehicle which claimant driver determines post accident to be a patrol car driven by an "on duty" law enforcement officer who is neither responding to a call nor pursuing a fleeing suspect.

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STATEMENT OF THE CASE

A. PETITIONERS' VERSION OF THE FACTS IS INACCURATE IN "A. THE PARTIES AND INCIDENT BELOW" AND "B. THE CLAIMS AND RECORD EVIDENCE BELOW."

Petitioners have inappropriately included "facts" not cited by either the trial court in its Order Granting Summary Judgment or the Eleventh Circuit Court of Appeal in its opinion. Petitioner seeks to blur the purported evidence of constitutional deprivation with the purported evidence of governmental liability. Both lower courts relied on the same material facts for determining whether the Petitioners had been deprived of any constitutional right. Finding no constitutional deprivation, neither court reached the issue of governmental liability. Respondents respectfully request that this Court review only those material facts considered by the courts below.[1]

---

[1] For purposes of the Motion for Summary Judgment the "material facts" recited by Judge Conway in the Order Granting Summary Judgment were undisputed among the parties. *See,* Answer Brief of Defendants/Appellees County of Volusia and George Lee Watson, in his Official Capacity, p.31. Paraphrased in the "Background" of its opinion, these material facts were adopted by the Eleventh Circuit Court of Appeal. *See,* Petition for a Writ of Certiorari, App.2. The undisputed facts set forth in Respondents' Appendix at App.1-11 were posited in their Answer Brief below as material *only* if the Eleventh Circuit found that the trial court erred in finding no constitutional deprivation by the conduct of Deputy Watson. *See,* Answer Brief of Defendants/Appellees County of Volusia and George Lee Watson, in his Official Capacity, pp.5-17. These Respondents include these in their Appendix here to illuminate error in Petitioners' non material facts and to provide background for Judge Anderson's concurring opinion in the Rooney case. *See,* n.15, *infra.*

THE MATERIAL FACTS

Plaintiffs Keith Rooney and John Rooney III were injured when the vehicle they were occupying was involved in a traffic accident with a sheriff's patrol vehicle driven by Defendant George Lee Watson. The accident occurred on the evening of January 23, 1989. Watson was "on duty" as a deputy sheriff at the time of the collision. It is undisputed that he was neither engaged in a police pursuit, nor responding to an emergency call. It is also undisputed that he was not operating his emergency lights and siren. The Rooneys' vehicle was struck when it turned left into the path of Watson's oncoming vehicle. Plaintiffs' accident reconstructionist opines that Watson's vehicle was traveling approximately 82 m.p.h. prior to the collision, reduced to approximately 73 m.p.h. at the time of impact. Deposition of Joseph Wattleworth, Ph.D. (Dkt. 150) at 86. The speed limit was 55 m.p.h. at the site of the accident.[2]

B. PETITIONERS CONTINUE TO TRY TO INSERT A NEW CAUSE OF ACTION AT THE APPELLATE LEVEL

At the district court level, the Rooneys asserted that the County of Volusia and Deputy Watson, "subjected them to a deprivation of their rights to life, liberty and property; their rights to procedural due process; and their

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[2] Order Granting Summary Judgment. *See*, Petition for a Writ of Certiorari, App.11-App.12.

rights to travel protected by the privileges and immunities clause, all guaranteed by the United States Constitution." The Rooneys' Petition for Writ of Certiorari asserts a violation of the Rooneys' rights only under the Fourteenth Amendment; abandons any claim under the Fifth Amendment and continues the appellate omission/abandonment of any claim of deprivation of their right to travel. The County of Volusia asserts and assumes abandonment of these claims.

The Rooneys also appear to have abandoned their claim of deprivation of their constitutional rights under the Fourth Amendment. Nevertheless, Petitioners' argument in support of their Fourteenth Amendment claim may also be read as a Fourth Amendment claim. The Petitioners analogize the conduct of Deputy Watson as "a vehicular attack" upon the Rooney boys to the conduct of the Charles County deputy sheriff who purposefully shot and killed Charles Revene. *See,* Petition for a Writ of Certiorari at p.17 and *Revene v. Charles County Commissioners,* 882 F.2d 870 (4th Cir. 1989).

A Fourth Amendment claim for unlawful seizure and excessive use of force was first raised by the Rooneys on appeal in the Eleventh Circuit. *See,* Appellants' Initial Brief, pp.35-36. In their Answer Brief in the Eleventh Circuit the Respondents, County of Volusia and George Lee Watson, in his official capacity, objected to the assertion of the new claim and these Respondents continue to do so. See Answer Brief of Defendants/Appellees County of Volusia and George Lee Watson, in his Official Capacity, p.30. A new basis for a claim may not be raised in this manner at the appellate level. *See, Wisconsin v. Mitchell,* 508 U.S. 476, 113 S.Ct. 2194, 2198, n.2, 124 L.Ed.2d 436

(1992); *Yee v. Escondido*, 503 U.S. 519, 533, 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992).

REASONS WHY A WRIT OF CERTIORARI SHOULD NOT BE GRANTED

A. THERE IS NO RULE 10 "CONFLICT" TO SUPPORT GRANTING A WRIT OF CERTIORARI

Petitioners seek a Writ of Certiorari by invoking Rule 10(a) of the Rules of the Supreme Court. Petitioners have either misread applicable cases or have claimed conflict with nonapplicable ones. Petitioners assert that the Eleventh Circuit Court of Appeals erred in its factual analysis by failing to consider the conduct of Deputy Watson in the context of the conduct of his governmental employer, the County of Volusia. Because of this failure, Petitioners assert that the Eleventh Circuit mischaracterized the conduct of Deputy Watson as negligent or grossly negligent rather than an abuse of power. Although Petitioners agree with the Eleventh Circuit's properly stated rule of law that a negligent act is not cognizable under Title 42 U.S.C. Section 1983, Petitioners argue that this rule of law was factually misapplied by the Eleventh Circuit in the case at bar and *Cannon v. Taylor*, 782 F.2d 947 (11th Cir. 1986). Petitioners do not provide compelling reasons nor conflict with other circuit courts on the same important matter sufficient to justify this Court's granting of a Writ of Certiorari.

B. REVIEW IS NOT WARRANTED; THE STANDARD OF CARE NECESSARY TO PROVE A VIOLATION OF SUBSTANTIVE DUE PROCESS ARTICULATED BY THE ELEVENTH CIRCUIT IN THE *ROONEY* DECISION DOES NOT CONFLICT WITH THE STANDARD OF CARE ARTICULATED IN THE DECISIONS OF THIS COURT OR BY THE DECISIONS OF THE FEDERAL CIRCUIT COURTS OF APPEAL.

1. "CONFLICT" CASE OVERVIEW

In the case submitted for review, the trial judge based her ruling upon precedent of this Court and the Eleventh Circuit Court of Appeal. *See, Los Angeles v. Heller*, 475 U.S. 796, 106 S.Ct. 1571, 89 L.Ed.2d 806 (1986); *Vineyard v. County of Murray, Ga.*, 990 F.2d 1207, cert. denied, 510 U.S. 1024, 114 S.Ct. 636, 126 L.Ed.2d 594 (1993); *Cannon v. Taylor*, 782 F.2d 947 (11th Cir. 1986). The Eleventh Circuit relied not only on these cases but also *Parratt v. Taylor*, 451 U.S. 527, 535, 101 S.Ct. 1908, 1912-1913, 68 L.Ed.2d 420 (1981), *overruled on other grounds by Daniels v. Williams*, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986); *Burch v. Apalachie Community Health Services, Inc.*, 840 F.2d 797, 800 (11th Cir. 1988), aff'd by *Zinermon v. Burch*, 494 U.S. 113, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990); and *Roach v. City of Fredericktown, Mo.*, 882 F.2d 294 (8th Cir. 1989).

The Rooneys seek a Writ of Certiorari based upon an alleged conflict between the instant decision of *Rooney v. Watson* and six decisions of this Court and three decisions from various circuit courts of appeal. The Rooneys claim that the "custom or policy" analysis by the Eleventh Circuit conflicts with the decisions of *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981); *Daniels v.*

Williams, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986); *Davidson v. Cannon*, 474 U.S. 344, 106 S.Ct. 668, 88 L.Ed.2d 677 (1986); *Zinermon v. Burch*, 494 U.S. 113, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990); *Collins v. City of Harker Heights*, 503 U.S. 115, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992); *Lewis v. Sacramento County*, 98 F.3d 434 (9th Cir. 1996) and *Revene v. Charles County Commissioners*, 882 F.2d 870 (4th Cir. 1989). The Rooneys claim that the "failure to train" analysis by the Eleventh Circuit conflicts with *City of Canton, Ohio v. Harris*, 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989); *Collins v. City of Harker Heights, Texas*, 475 U.S. 796, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992), *Fagan v. City of Vineland*, 22 F.3d 1283 (3rd Cir. 1994), on reh *en banc*, 22 F.3d 1296 (3rd Cir. 1994); and *Lewis v. Sacramento County*, 98 F.3d 434 (9th Cir. 1996).

The *Rooney* holding by the Eleventh Circuit Court of Appeals is in accord with this Court's decisions in *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976); *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981); *Daniels v. Williams*, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986); *Davidson v. Cannon*, 474 U.S. 344, 106 S.Ct. 668, 88 L.Ed.2d 677 (1986); *City of Los Angeles v. Heller*, 475 U.S. 796, 106 S.Ct. 1571, 89 L.Ed.2d 806 (1986); *City of Canton, Ohio v. Harris*, 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989); *Collins v. City of Harker Heights*, 475 U.S. 796, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992). The *Rooney* holding does not conflict with petitioners' cited cases of the Third, Fourth, and Ninth Circuits, respectively, in a manner requiring issuance of the requested Writ. The Petition for Writ of Certiorari should be denied.

2. ESTABLISHING LIABILITY UNDER TITLE 42 U.S.C SECTION 1983

The Rooneys have sued the County of Volusia and Deputy George Lee Watson, individually and in his official capacity. The addition of George Lee Watson in his official capacity as a defendant, is surplusage. The naming of an appropriate official capacity defendant is another way of suing the governmental entity and the proof required for liability is identical. *Kentucky v. Graham*, 473 U.S. 159, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985). Thus, the arguments of County of Volusia and George Lee Watson, in his official capacity, are merged.

The statutory vehicle by which the Rooneys sought damages against the County of Volusia and George Lee Watson, individually and in his official capacity, is Title 42, United States Code, Section 1983.[3] The statute itself does not create any substantive rights but authorizes relief if a claimant proves the requisite elements to establish liability. *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 617, 99 S.Ct. 1905, 60 L.Ed.2d 508 (1979).

To prevail the claimant must first prove there was a deprivation of any rights, privileges, or immunities secured by the Federal Constitution or a federal law other than Title 42, Section 1983; the claimant must then prove

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[3] "Every person who, under color of any Statute, ordinance, regulation, custom or usage, of any State or Territory, subjects or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and Laws, shall be liable to a party injured in an action at law, suit in equity or other proper proceeding for redress."

that such deprivation was caused by the act or omission of a person under color of law. If a claimant sues a governmental actor and the governmental employer, there is a distinct and separate threshold standard of proof to establish governmental liability.

In following the analytical process established by this Court for proving a claim under Title 42 U.S.C. Section 1983, both courts below relied upon the decision of *City of Los Angeles v. Heller*, 475 U.S. 796, 799, 106 S.Ct. 1571, 1573, 89 L.Ed.2d 806 (1986). In *Heller* this Court found that no court decision authorized damages against a government if the government's officer inflicted no constitutional harm, and said, " . . . if a person has suffered no constitutional injury at the hands of the individual police officer, the fact that department regulations might have authorized the use of constitutionally excessive force is quite beside the point."[4] *In accord, see also, Mark v. Borough of Hatboro*, 51 F.3d 1137 (3rd Cir. 1995); *In re City of Philadelphia Litigation*, 49 F.3d 945 (3rd Cir. 1995); *Thompson v. Boggs*, 33 F.3d 847, 858-59 and n.11 (7th Cir. 1994); *Hinton v. City of Elwood, Kan.*, 997 F.2d 774, 782 (10th Cir. 1993); *Temkin v. Frederick County Com'rs*, 945 F.2d 716, 724 (4th Cir. 1991); *Roach v. City of Fredericktown, Mo.*, 882 F.2d 294, 297-298 (8th Cir. 1989); *Jones v. Chieffo*, 833 F. Supp. 498, 507-508 (E.D. Pa. 1993), *aff'd without opinion*, 22 F.3d 169 (3d Cir. 1994).[5] *But see, Fagan v. City of*

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[4] This holding had the effect of affirming the district court's ruling that the theory against the governmental defendants based on *Monell* was moot. *Id.* at p.800, n.1.

[5] In Volume I of his treatise, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION, THE LAW OF SECTION 1983 Sheldon H. Nahmod asserts:

Vineland, 22 F.3d 1283 (3rd Cir. 1994), on *reh'g en banc*, 22 F.3d 1296 (3rd Cir. 1994) and discussion *infra* at pages 11-14.

More recently, in the unanimous opinion of *Collins v. City of Harker Heights*, 503 U.S. 115, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992), this Court emphasized " . . . the separate character of the inquiry into the question of municipal responsibility and the question whether a constitutional violation occurred." *Id.* at 122 and at 1067. This Court stated that it had assumed that a constitutional violation had been adequately alleged or proved in the cases of *City of Canton, Ohio v. Harris*, 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989); *City of St. Louis v. Praprotnik*, 485 U.S. 112, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988); *Pembaur v. City of Cincinatti*, 475 U.S. 469, 483, 106 S.Ct. 1292, 1300, 89 L.Ed.2d 452 (1986) and *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 105 S.Ct. 2427, 85 L.Ed.2d 791 (1985). In *Harris, Praprotnik, Pembaur*, and *Tuttle* this Court's opinions focused solely on the separate issue of governmental liability. *Id.* at 121-122 and at 1066-1068. In *Collins*, Justice Stevens specified that the *Canton* Court *had identified* "deliberate indifference" as the *threshold standard for finding governmental liability* for a constitutional tort by an inadequately trained employee and *not the threshold standard of proof* that a claimant must show to

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"*Heller's* precise holding is not controversial. Surely a local government cannot be held liable for a constitutional deprivation brought about through an official policy or custom if a determination has been made that there was no constitutional deprivation in the first place." 1 SHELDON H. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION, THE LAW OF SECTION 1983, 425 (3rd Ed.)).

make out the underlying claim *of a constitutional violation*. (emphasis added) *Id.* at 124 and at 1068.

The Rooneys ignore *Heller, Collins,* and their predecessors and progeny including the opinion of the Eleventh Circuit Court of Appeal in *Vineyard v. County of Murray, Ga.*, 990 F.2d 1207, 1211 (11th Cir. 1993). That Petitioners miss the point of *Heller* and *Collins* can be seen in the format of their Petition. Petitioners do not establish the legal duty of care owed by a law enforcement officer under the Fourteenth Amendment to citizens under the facts and circumstances of the instant case. Petitioners do not apply the legal standard of care to the conduct of Deputy Watson and show that the conduct of Deputy Watson violated that standard of care vis-a-vis the Rooneys and deprived them of a constitutional right. The Petitioners simply discuss "custom or policy" and "failure to train," confusing and combining the threshold standard of proof for the underlying constitutional violation by a state actor with the threshold standard of proof for establishing governmental entity liability.

The Rooneys argue that there is a blurring of the evidence of proof of constitutional deprivation with that of governmental liability. The Rooneys assert a due process claim may even be maintained against the County of Volusia when there was no violation of the Fourteenth Amendment by Deputy Watson. The Rooneys rely upon *Fagan v. City of Vineland*, 22 F.3d 1283 (*Fagan I*), on *reh'g en banc*, 22 F.3d 1296 (*Fagan II*) (3rd Cir. 1994).[6]

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[6] At the time the Rooneys' lawsuit was filed, *Fagan* had been decided at the district court level where the court entered

The *Fagan I* panel unanimously held " . . . that the City may be independently liable for violating the plaintiff's constitutional rights even if no individual police officer is liable." 22 F.3d at 1302. The *Fagan I* court said: " . . . [I]n a substantive due process case *arising out of a police pursuit,* an underlying constitutional tort case still exists even if no individual police officer violated the Constitution." 22 F.3d at 1292. (emphasis added)

In *Fagan II,* the City of Vineland and the defendant police officers limited their Petition for Rehearing *en banc* to the question of the appropriate standard to be applied in police pursuit cases which allege a violation of substantive due process. *Id.* at 1302. After granting rehearing *en banc,* the Court, pursuant to its Internal Operating Procedures, vacated the panel's opinion. *Id.* The *en banc* court limited its consideration to the one issue raised in the petition. The panel opinion on all the other issues, edited to conform to the new *en banc* result, was filed contemporaneously with the *en banc* opinion.

Although the *en banc* decision found that: "[T]he City is liable under section 1983 if its policymakers, acting with deliberate indifference, implemented a policy of inadequate training and thereby caused the officers to conduct the pursuit in an unsafe manner and deprive plaintiffs of life and liberty," the opinion also favorably cites one of its earlier *en banc* decisions which found

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summary judgment in favor of the City of Vineland. The District Court applied the two prong test and cited *City of Canton v. Harris,* 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989) and *City of Los Angeles v. Heller,* 475 U.S. 796, 106 S.Ct. 1571, 89 L.Ed.2d 806 (1986).

"where a person suffers *injury as an incidental and unintended consequence* of official action, the abuse of power contemplated in the due process and [eighth] amendment cases does not arise." (emphasis added)[7]

Fagan I and *Fagan II* examined the facts of a police pursuit of suspect Tesoroni. Although the officer did not intend for Tesoroni to speed away or to be injured, the officer's attempt to pull Tesoroni over had that result. Unlike the officer in *Fagan*, the conduct of Deputy Watson did not cause John Rooney, III, to turn his vehicle. Deputy Watson's conduct did not cause John Rooney, III, to misjudge the speed of the oncoming patrol car. At most, the Rooney case falls factually within the *O'Lone* category and there is no conflict with either *Fagan I* or *Fagan II*.

It is doubtful that the anomalous portion of the decision in *Fagan I* finding independent governmental liability carries great weight even within the Third Circuit Court of Appeal itself. Two essentially different panels of the Third Circuit have addressed governmental liability under Section 1983 and have followed the two pronged analysis emphasized in *Collins*. In March of 1995, Judge Lewis, who served on the *Fagan I* panel, followed the two pronged analysis and found a constitutional deprivation (excessive use of force) as a precursor to governmental liability. *See, In re City of Philadelphia Litigation*, 49 F.3rd 945 (3rd Cir. 1995). Later that same month, another panel of the circuit addressed the case of *Mark v. Borough of Hatboro*, 51 F.3d 1137, Sur Petition *reh'g denied, en banc*

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[7] *Davidson v. O'Lone*, 752 F.2d 817, 827 (3rd Cir. 1984), *aff'd sub nom.*, 471 U.S. 1134, 105 S.Ct. 2673, 86 L.Ed.2d 692 (1985).

reh'g denied (3rd Cir. 1995). In the majority opinion, Judge Greenburg distanced the *Mark* decision from *Fagan I* and quoted the language from *Collins* requiring separation of the two different issues in analyzing a Section 1983 claim. *Id.*, at 1149-50. In recognition of *Collins'* two prong test, Judge Greenburg noted that " . . . the *Fagan* panel appeared to hold that plaintiff can establish a constitutional violation predicate to a claim of municipal liability simply by demonstrating that the policymakers, acting with deliberate indifference, enacted an inadequate policy that caused an injury. . . . [B]y focusing almost exclusively on the 'deliberate indifference' prong of the *Collins* test, the panel opinion did not apply the first prong – establishing an underlying constitutional violation." *Id.* at 1149-1150, n.13.

There is no material conflict between or within the circuits for this Court to resolve.

3. ESTABLISHING A CONSTITUTIONAL DEPRIVATION UNDER THE SUBSTANTIVE DUE PROCESS COMPONENT OF THE FOURTEENTH AMENDMENT'S DUE PROCESS CLAUSE

Under the two prong test of *Heller* and *Collins*, the first prong is to establish deprivation of a constitutional right. To determine whether the Rooneys have suffered a substantive due process constitutional deprivation cognizable under Title 42 U.S.C. Section 1983, the Rooneys' claims should be analyzed using cases that have reviewed deprivation claims under the Fourteenth Amendment, *simpliciter*. This Court has considered such deprivation

claims in the context of injury to reputation in *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976), loss of property in *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), personal injury in *Daniels v. Williams*, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986), personal injury in *Davidson v. Cannon*, 474 U.S. 344, 106 S.Ct. 668, 88 L.Ed.2d 677 (1986), wrongful death in *Collins v. City of Harker Heights, Texas*, 503 U.S. 115, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992), and loss of liberty in *Zinermon v. Burch*, 494 U.S. 113, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990).

Of these cases, three turned on substantive due process issues and three on procedural due process issues. Those addressing substantive due process were *Daniels*, *Davidson*, and *Collins* and those addressing procedural due process were *Paul*, *Parratt*, and *Zinermon*. As the Rooneys submit a substantive due process claim there can be no conflict shown with *Paul*, *Parratt* and *Zinermon*.

Although the holdings of *Paul* and *Parratt* address issues of procedural due process, the dicta of these cases discuss concerns that if the claims in those cases were upheld, the cases could be used to support Fourteenth Amendment claims in cases which factually match the case under consideration by this Court as the subject of the Petition for a Writ of Certiorari. In the subject case, John Rooney III turned his northbound vehicle left across the southbound lane of State Road 11 into the path of the southbound "speeding" patrol vehicle at an intersection which had no traffic control devices except a broken centerline. This Court opined in *Paul* that if the claimant prevailed, then "it would be difficult to see why . . . the survivors of an innocent bystander . . . negligently killed

by a sheriff driving a government vehicle would not have claims equally cognizable under 1983." *Paul v. Davis*, 424 U.S. 693 at 698, 96 S.Ct. 1155 at 1159, 47 L.Ed.2d 405 (1976). The *Parratt* Court was concerned that adopting the rationale of that claimants' argument would permit " . . . any party who is involved in nothing more than an automobile accident with a state official [to] . . . allege a constitutional violation under Section 1983. 'Such reasoning would make the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may be already administered by the states'; *Paul v. Davis*, 424 U.S. 693, 701, 96 S.Ct. 1155, 1160, 47 L.Ed.2d 405 (1976)." *Parratt v. Taylor*, 451 U.S. 527 at 544, 101 S.Ct. 1908 at 1917, 68 L.Ed.2d 420 (1981).

The protection of the Due Process Clause, whether substantive or procedural, is not triggered by negligence even if such negligence led to serious injury. *Davidson v. Cannon*, 474 U.S. 344, 347-348, 106 S.Ct. 668, 88 L.Ed.2d 677 (1986). The Fourteenth Amendment is simply not implicated by *unintended* injury to life, liberty, or property. *Daniels v. Williams*, 474 U.S. 328, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986). The intent of the Due Process Clause is to prevent governmental abuse of its power. *See, Collins v. City of Harker Heights*, 503 U.S. 115 at 125, 112 S.Ct. at 1069 quoting from *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 at 196, 109 S.Ct. 998 at 1003, 103 L.Ed.2d 249 (1989), quoting *Davidson v. Cannon*, 474 U.S. 344, 348, 106 S.Ct. 668, 670, 88 L.Ed.2d 677 (1986). *See also, Daniels v. Williams*, 474 U.S. 328, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986); *Baker v. McCollan*, 443 U.S. 137, 99 S.Ct. 2689, 61 L.Ed.2d 433 (1979); *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976).

Based upon the facts analyzed in the case under review, the Eleventh Circuit Court of Appeals found the Rooney case materially indistinguishable from its decision in *Cannon v. Taylor*, 782 F.2d 947 (11th Cir. 1986)[8] and opined that Deputy Watson's conduct might be characterized as negligent or grossly negligent.[9] Following its holding in *Cannon*, the Eleventh Circuit found that whether the conduct of Deputy Watson was characterized as negligent or grossly negligent that conduct did not implicate the Fourteenth Amendment and did not support a claim under Title 42 U.S.C. Section 1983.[10]

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[8] In the *Cannon* case, Lema Cannon was killed in an intersectional accident with a city police vehicle in which Officer Taylor was responding to a disturbance call at a local pool hall and was driving his police vehicle without emergency lights or siren activated at a speed of at least forty-six miles per hour in a thirty mile per hour zone. 782 F.2d at 948. Officer Taylor was not involved in a "pursuit" or a "police chase." *Id.*

In the instant case, the Rooney/Watson accident occurred in a very rural area of Volusia County on a state highway (S.R. 11) when Plaintiff/Appellant, John Rooney, III, turned his northbound vehicle left to access a dirt lane (Reynolds Road), which intersects with the west side of S.R. 11. Deputy Watson was not responding to a specific call and was not involved in a "pursuit" or "police chase," he was en route from his usual east side zone to assist in providing zone coverage as necessary on the west side of the County. Deputy Watson, like Officer Taylor of *Cannon*, was operating his police vehicle at an assumed speed of 75-82 miles per hour, fifty percent over the posted speed when this accident occurred.

[9] Under Florida law speed alone is not sufficient evidence to prove a driver was guilty of gross negligence. *See, Hodges v. Helm*, 222 So.2d 418 (Fla. 1969); *Orme v. Burr*, 25 So.2d 870 (Fla. 1946); *Frank v. Lurie*, 157 So.2d 431 (Fla. 2nd DCA 1963).

[10] In *Cannon* the Eleventh Circuit Court of Appeal held as a matter of law " . . . that a person injured in automobile accident

Petitioners admit that negligent conduct does not give rise to a constitutional tort under *Daniels* and *Davidson;* but relying on a misreading of *Parratt,* Petitioners argue that negligent conduct or grossly negligent conduct of an officer is not viewed separately from the conduct of the government in a substantive due process case involving "custom or policy" and/or "failure to train" and that negligent or grossly negligent conduct may be viewed as more than negligent or grossly negligent in the superimposed context.

4. UNINTENDED INJURY TO LIFE, LIBERTY OR PROPERTY NOT ABUSE OF GOVERNMENTAL POWER

Evaluation of the facts of the instant case against this Court's forgoing substantive due process decisions shows that the Rooney case does not fall within this Court's parameters for establishing a violation of a substantive due process right. Although Deputy Watson was "on duty,"[11] it is doubtful that his conduct was under color of

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caused by the negligent, or even grossly negligent operation of a motor vehicle by a policeman acting in the line of duty has no Section 1983 cause of action for violation of a federal right." *Cannon,* 782 F.2d at 950.

[11] *See also, Revene v. Charles County Commissioners,* 882 F.2d 870, 872 (4th Cir. 1989), (finding that the fact the officer was "off duty" did not dictate that he was not acting under color of law). The *Revene* decision turned on the "color of law" issue and did not address the threshold standard for liability for establishing a substantive due process claim or the threshold standard for governmental liability. There is no conflict between the *Revene* decision and the *Rooney* decision which merits *certiorari* review by this Court.

law in a constitutional sense. These Respondents noted in their Answer Brief in the Eleventh Circuit that there is nothing in the material facts which supports that the Rooney boys and Deputy Watson had any relationship to each other beyond that of the relationship of any motorists approaching each other from opposite directions on a rural highway. *See*, Answer Brief of Defendants/Appellees County of Volusia and George Lee Watson, in his Official Capacity, p.34.

The Rooney/Watson "relationship" is the type of relationship that this Court's majority found unavailing in *Daniels* when it opined that "[t]he only tie between the facts of this case and anything governmental is the fact that the respondent was a sheriff's deputy at the Richmond City jail and petitioner was an inmate in that jail." *Daniels v. Williams*, 474 U.S. 327 at 332, 106 S.Ct. 662 at 666, 88 L.Ed.2d 662 (1986). Justice Blackmun, who concurred with this statement in *Daniels*, expanded and explained it in his *Davidson* dissent. Justice Blackmun opined that, in *Daniels*, the negligence was " . . . only coincidentally connected to an inmate-guard relationship; the same incident could have occurred on any staircase. Daniels in jail was as able as he would have been anywhere else to protect himself against a pillow on the stairs. The State did not prohibit him from looking where he was going or from taking care to avoid the pillow." *Davidson v. Cannon*, 474 U.S. 344 at 355, 106 S.Ct. 668 at 674, 88 L.Ed.2d 677 (1986).

This analysis is even more applicable to the *Rooney* case where there is no governmental custodian. That is, the only tie between the facts of this case and anything governmental is that a sheriff's deputy was driving a patrol vehicle. As the deputy was not engaged in an

emergency response or pursuit, the same incident could happen between two opposing motorists on any rural highway. The government neither prohibited John Rooney, III, from looking where he was going nor prohibited him from taking care to avoid turning in front of the oncoming "speeding" vehicle which he saw approaching.

There is nothing in the "material facts" which supports a finding that any conduct of Deputy Watson prompted a decision of John Rooney, III, to turn left into the path of the patrol vehicle. To the contrary, John Rooney, III, testified that he brought his parents' truck to a full stop at a rural highway intersection when he had no traffic control device requiring him to do so and he saw no traffic approaching. (R5-152, p.32). He further testified that after he was stopped, he saw the headlights of a southbound vehicle. *Id.* at 34 (1-4). Without ever losing sight of those headlights and without anything compelling him to do so, John Rooney, III, made the decision to leave the stopped position and turned his parents' truck into the path of the southbound vehicle to access Reynolds Road on the west side of S.R. 11. *Id.* at p.34 (7-22); p.35 (20-21). It was not until he was out of the truck and the truck had burst into flames that John Rooney, III, " . . . first noticed that the vehicle that struck his was a sheriff's patrol car,". See, Petition for A Writ of Certiorari at p.4.

There is nothing in the "material facts" which supports that Deputy Watson abused his power or intended any injury to life, liberty or property of himself and/or others as he drove south on S.R. 11.

To establish conflict between the decisions of the circuit courts of appeal and the *Rooney* decision regarding

the threshold standard for establishing a substantive due process violation, the Petitioners offer the police pursuit cases of *Lewis v. Sacramento County*, 98 F.3d 434 (9th Cir. 1996); and *Fagan v. City of Vineland*, 22 F.3d 1283 (3rd Cir. 1994), on *reh'g en banc*, 22 F.3d 1296 (3rd Cir. 1994). In *Lewis* the Ninth Circuit adopted a standard of care that required that an officer's conduct exhibit "deliberate indifference to or reckless disregard for, a person's right to life and personal security" to establish a constitutional deprivation under the substantive due process element of the Fourteenth Amendment.[12] The Third Circuit ruled that "the substantive component of the due process clause can only be violated by governmental employees when their conduct amounts to an abuse of official power that 'shocks the conscience.' " *Fagan v. City of Vineland*, 22 F.3d 1283 (3rd Cir. 1994), on *reh'g en banc*, 22 F.3d 1296, 1302 (3rd Cir. 1994). Neither of these decisions adopt negligence or gross negligence as the standard for evaluating a police officer's conduct to determine whether a substantive due process violation has occurred. The Eleventh Circuit Court of Appeal's factual finding that Deputy Watson's conduct may be characterized as either negligence or gross negligence does not establish conflict with either the *Lewis* or *Fagan* decision as claimed by the

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[12] The Ninth Circuit specifically overruled its earlier decisions in *Fargo v. City of San Juan Bautista*, 857 F.2d 638 (9th Cir. 1988) and *Wood v. Ostrander*, 851 F.2d 1212, 1214 (9th Cir. 1988) ("*Wood I*"), *reh'g granted and opinion modified by*, 879 F.2d 583 (9th Cir. 1989) ("*Wood II*"), *cert. denied*, 498 U.S. 938, 111 S.Ct. 341, 112 L.Ed.2d 305 (1990), to the extent *Fargo*, *Wood I*, and *Wood II* set a standard of gross negligence for a 1983 violation alleged under the due process clause. *Lewis v. Sacramento County*, 98 F.3d 434, 441 (9th Cir. 1996).

Petitioners. Clearly, the Eleventh Circuit applies a higher standard to conduct to establish a substantive due process violation. The fact that the higher standard was not articulated in *Rooney* does not create conflict.

Although the Third Circuit used the higher standard of "shocks the conscience" and the Ninth circuit used "deliberate indifference", neither the *Fagan* nor the *Lewis* decisions found a deprivation of substantive due process by a law enforcement officer even in the context of driving at high speeds during a police pursuit or emergency response. Neither do the cases found by the Respondents. (*See* n.13 and 14). The Petitioners offer no case that either suggests or finds that negligence or gross negligence by a law enforcement officer driving at high speeds will support a substantive due process claim under Title 42 U.S.C., Section 1983. Research by these Respondents did not reveal any circuit court of appeal which currently evaluates negligent or grossly negligent police officer conduct during a high speed chase or emergency response as violative of substantive due process.[13]

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[13] *See, Medina v. City and County of Denver*, 960 F.2d 1493, 1496 (10th Cir. 1992) (finding reckless disregard as the standard to establish a substantive due process violation of the Fourteenth Amendment); *Temkin v. Frederick County Commissioners*, 945 F.2d 716 (4th Cir. 1991), *cert. denied*, 502 U.S. 1095, 112 S.Ct. 1172, 117 L.Ed.2d 417 (1992); (affirming summary judgment in favor of officer and county; finding no substantive due process violation as officer's conduct did not "shock the judicial conscience" in a nighttime high speed pursuit (65-105 miles per hour) of claimant who failed to pay $17.00 for gasoline at a convenience store did not shock the judicial conscience); *Roach v. City of Fredricktown*, 882 F.2d 294, 297 (8th Cir. 1989) (affirming dismissal of claims; finding no substantive due

5. ESTABLISHING GOVERNMENTAL LIABILITY FOR A CONSTITUTIONAL TORT BY ITS EMPLOYEE

In proving a Section 1983 claim against a government rather than an individual, a claimant may not rely on a theory of *respondeat superior, Monell v. Department of Social Service*, 436 U.S. 658, 692, 98 S.Ct. 2018, 2036, 56 L.Ed.2d 611 (1978), but must prove that a statute, ordinance, custom or usage of the government caused the government's officer or employee to violate another's constitutional rights. *Id.* See also, *Adickes v. H.S. Kress & Co.*, 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970); *City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985), 105 S.Ct. 2427, 85 L.Ed.2d 791; *City of Edgewater v. Montesano*, 477 So.2d 54, 55 (Fla. 5th DCA 1985). Proof is required that the "offending" statute, ordinance, custom or practice of the government was established by the deliberate choice of the government officials responsible for final policy with

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process violation by officer's conduct in high speed pursuit of a misdemeanor suspect *without the patrol car's siren activated* as not "shocking to judicial conscience"; citing *Myers v. Morris*, 810 F.2d 1437, *reh'g* and *reh'g en banc denied* (8th Cir. 1987) finding neither negligence nor gross negligence implicates any aspect of the due process clause) *Checki v. Webb*, 785 F.2d 534 (5th Cir. 1986) (reversing jurisdictional decision and confirming "shocks the conscience" standard for evaluating substantive due process claims). *See also, Jones v. Sherrill*, 827 F.2d 1102, 1106 (6th Cir. 1987) (holding gross negligence or outrageous conduct is sufficient to implicate the due process clause relying specifically on the holding of *Nishiyama v. Dickson County, Tenn.*, 814 F.2d 277, 282-283 (6th Cir. 1987) *en banc*. The gross negligence standard of *Nishiyama* was recently overruled by the Sixth Circuit which now adheres to the "deliberate indifference standard. *Foy v. City of Berea*, 58 F.3d 227, 230 (6th Cir. 1995).

respect to the subject matter in question. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483, 106 S.Ct. 1292, 1300, 89 L.Ed.2d 452 (1986).

Governmental liability may be imposed for a single decision by a final policymaker under appropriate circumstances, but the government cannot be held liable for such decisions by someone who is not a final policymaker. *Id.* It is the law of the state which determines who is a policymaker for purposes of a Title 42 U.S.C. § 1983 complaint. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988). Proof of a single incident of deprivation pursuant to an unconstitutional policy may be sufficient, "[b]ut *where* the *policy* relied upon *is not itself unconstitutional, considerably more proof than the single incident will be necessary in every case to establish both* the requisite *fault* on the part of the municipality, *and* the *causal connection* between the 'policy' and the constitutional deprivation." *Tuttle*, 471 U.S. at 824. (emphasis supplied). To show a deprivation by custom or policy in the area of police training, a claimant must show that, "the failure to train amounts to a deliberate indifference to the rights of persons with whom the police come in contact." *City of Canton, Ohio v. Harris*, 489 U.S. 378, 388, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989)

In the case under review here, the Eleventh Circuit Court of Appeals declined to resort to the factual analysis of policy, custom or training that it had done in the *Cannon* case. The Eleventh Circuit found such consideration unnecessary[14] under the standards of *City of Los*

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[14] In his concurring opinion Judge Anderson not only agreed with Judge Hatchett that Deputy Watson had not

Angeles v. Heller, 475 U.S. 796, 799, 106 S.Ct. 1571, 1573, 89 L.Ed.2d 806 (1986); *Vineyard v. County of Murray, Ga.*, 990 F.2d 1207 (11th Cir. 1993); *Roach v. City of Fredericktown, Mo.*, 882 F.2d 294, 297-298 (8th Cir. 1989).

CONCLUSION

Based on the foregoing, Petitioners respectfully submit that the Petition for Writ of Certiorari should be denied and the decision of the Eleventh Circuit Court of Appeal should stand.

Respectfully submitted,

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DATED: October 6, 1997

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violated the Rooneys' due process rights but also opined that the evidence proffered by the Rooneys led him to readily conclude that the Rooneys failed to show that the County of Volusia was deliberately indifferent in any manner that could cause the accident. *See* Petition for a Writ of Certiorari, App.10.

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* * *

RE: DEFACTO POLICY

Pursuant to Article VIII, Section 1(c), Fla. Const. (1968), the citizens of Volusia County adopted a Home Rule Charter which was created by Special Act of the Florida Legislature. (R-61, Exhibit 1); *See also*, Ch. 70-966, Laws of Florida, as amended. As established by the Home Rule Charter, it is Volusia County that is the body corporate and politic and is empowered as the government. (Sp.Acts 70-966, Art. I, §102 and Art. II, §201). In litigation involving policy or simple negligence of its employees, the corporate body is to be named as the party. (Sp.Acts 70-966, Art. XIII, §1306) by its corporate name of the County of Volusia. (Sp.Acts 70-966, Art. I, §103). It is the County Council which is imbued with the power of setting policy for the County of Volusia. (Sp.Acts 70-966, Art. II, §203) The Sheriff is the elected Director of the Department of Public Safety for the County of Volusia, sometimes commonly called Volusia County Sheriff's Department or Volusia County Sheriff's Office. (Sp.Acts 70-966, Art. VI §602.1(1)). The Sheriff is the principal officer of the Department responsible for carrying out the responsibilities of law enforcement in Volusia County. (Sp.Acts 70-966, Art VI, §601.1(2) and §602).

The Policy and Procedures Manual in effect on January 23, 1989, for the Volusia County Department of Public Safety contained the following written policy addressing operation of a patrol vehicle for non-emergency matters:

> Section 130.12, *Safe Driving of Department Vehicles*: Operators of Department vehicles shall operate such vehicles in a reasonable and safe manner exercising due caution and judgment. They shall obey the motor vehicle laws and

> traffic regulations of the State. Drivers shall adhere to Procedures Directives on emergency and pursuit runs. (*See* Procedure Directive N-1-86, at R5-136, Ex. 1).

Procedure Directive N-1-86 addressed operation of a patrol vehicle as an authorized emergency vehicle. *Id.* This Procedure Directive allowed a deputy sheriff to proceed above the posted speed under certain conditions but only with emergency lights activated. *Id.* The use of the siren was desirable but not always required. *Id.* Policy N-1-86 adopted a more stringent standard than the referenced Florida Statutes 316.072 (1989) for operation of an authorized emergency vehicle. *Id.* If a deputy went in excess of the posted speed to a non-emergency matter, it violated this policy. (R5-169, p.107); (R5-173, p.44); (R5-156, p.33).

Deputy George Lee Watson testified that he knew and understood the department policy as stated in N-1-86 and knew no policy allowed him to go in excess of the posted speed to a non-emergency matter. (R5-136, Ex. 1). He had known the essence of this policy since rookie school. (R5-179, p.90). There was no deposition testimony of any law enforcement officer that they ever saw Deputy Watson driving his patrol car above the posted speed to a non-emergency matter. (R5-159, pp.17-18); (R5-162, p.41); (R5-160, p.33); (R5-167, p.48 (21-23)). No supervisor from any agency regarded George Watson's driving a problem. *Id.* and (R5-145); (R5-167, p.48 (24-25)); p.49 (1-3).

In deposition testimony, ranking officers in the Department of Public Safety acknowledged that there were complaints from time to time of deputies going

above the posted speed without lights and/or siren activated and that typically, the complaints were made through a telephone call. *See* (R5-145); (R5-169, pp.69, 77-83); (R5-149, p.75-87); (R5-173, pp.61-62); (R5-151, pp.61-63); (R5-160, p.34). The testimony of these officers was unanimous that such complaints were investigated to the extent possible based upon the information provided by the complainant. *Id.* Deputies who could be identified were interviewed and appropriate measures were taken by supervisors in the deputy's chain of command including the Sheriff or by Internal Affairs. *Id.* The action taken, if disciplinary, usually reflected progressive discipline relating to frequency and/or severity of infraction by the deputy involved. *Id.* The disciplinary actions were in compliance with Procedure Directives J-2-84 and J-3-84. (R5-191).

Internal Affairs was the formal investigating arm of the department for personnel infractions of policy and procedure. (R5-149 pp.75-87 and 91-103). Citizens complaints would be handled in accordance with Procedure Directive J-4-84. (R5-191). For "speeding" complaints, Internal Affairs usually documented the complaint on a log obtained preliminary information to provide to supervisors for follow-up; and either counselled the deputy or the supervisor did so. *Id.* Documentation of counselling and the logs were destroyed under Public Records destruction order and schedule. (R5-149 p.86). Captain Bosco, who worked in Internal Affairs for the relevant time period, remembered one time a repeat offender for speeding was brought to his attention after counselling but repeat offenders were uncommon. (R5-149 pp.79, 81). Documented oral reprimands could be purged from files

upon a deputy's request, if no similar infraction occurred in a year but written reprimands could not. *Id.* Most if not all written reprimands regarding "speeding" were associated with an accident. *Id.*

Testimony of Major Sidney Massey, Lt. Randall Burnsed, and Captain Robert Bosco also revealed that the County of Volusia had a Risk Management Department and an Accident Review Committee. (R5-169, p.72); (R5-149, pp.91-103); (R5-160, p.32). The Accident Review Committee consisted of representatives from the various County departments who made recommendations to department/division heads as necessary regarding discipline and/or training of the County employees involved in any accidents. *Id.*

All extant accident reports and other documents reflecting disciplinary and/or training action taken regarding accidents involving all department motor vehicles were analyzed for the period from January, 1985, through and including January 23, 1989. (R5-144); (R5-141). During that time period, the Department of Public Safety had approximately the following number of sworn personnel: (a) 223 from January, 1985, to October, 1, 1985; (b) 269 from October 1, 1985 to October 1, 1986; (c) 276 from October 1, 1986, to October 1, 1987; (d) 286 from October 1, 1987 to October 1, 1988; and (e) 306 from October 1, 1988 to January 23, 1989. (R5-146). Virtually all of these sworn officers were assigned a department vehicle on a twenty-four hour basis under the Indianapolis Plan. *Id.* The Department sedans were driven approximately 20,000,000 total miles annually for 1985 through January 23, 1989. *Id.* This mileage figure does not include

transport vans or other special service motor vehicles which were also assigned to personnel. *Id.*

The analysis of the accidents categorize accidents as those occurring on patrol, in response or in pursuit. (R5-190). The patrol designation is for non-emergency operation of the motor vehicle and reflects vehicular accidents *other than* those occurring during a response or a pursuit. *Id.* Department vehicles on the table designated "patrol" include all department motor vehicles and are not restricted to those accidents involving the patrol division (a/k/a law enforcement services). *Id.* The action taken ranged from counseling to written reprimands and included retraining at the Emergency Vehicle Operations Course or attendance at a one day Defensive Driving Course. *Id.*

To support the defacto policy argument, Plaintiffs offer the deposition testimony of friends, family and work associates, who stated that they have observed deputies going above the posted speed without their patrol cars' lights or sirens activated prior to January 23, 1989. (R5-164, p.18 (1-5); R5-171, p.8-9; R5-175, p.13 (3-12); R5-174, p.15 (18-23) (24-25); p.16 (1-5); R5-154, p.11 (8-20); R5-168, p.8 (10-13); p.9 (1-5); R5-170, p.30 (9-11) and (20-24); p.31 (2-6) and (7-10)).

Their deposition testimony also showed the following "facts." Their testimony concerning deputies' driving over the posted speed may be categorized as follows: (a) Not over 60-65 mph/speed limit 55 mph (R5-166, p.10 (24-25); R5-168, p.13 (12-16); p.18 (2-4)); (b) 65-70 mph/speed limit 55 mph (R5-175, p.17 (21-25); p.19 (14-16)); (c) over 70 mph/speed limit 55 mph (R5-174, p.20 (13-15));

(d) 60 mph/speed limit 45 mph (R5-154, p.17 (18-24); p.19 (16-18); R5-170, p.35 (11-20)). These witnesses were guessing or giving their best estimates of the speed observed. *Id*. Only one of these witnesses was driving a car with a calibrated speedometer (R5-175, p.27). Most testimony related to deputies driving on state or federal highways (S.R. 11, (R5-164, p.22 (2) and (19-21); S.R. 15A, (R5-154, p.12 (1-7); S.R. 17, (R5-170, p.31 (7-10); R5-174, p.37 (16-18); R5-175, p.17 (21-25); S.R. 40, S.R. 44, U.S. 92 R5-154, p.12 (2-7); R5-164, p.23 (1-3); R5-166, p.9 (18-19); p.10 (7-8); R5-168, p.9 (16-18; 22-23); R5-170, p.31 (7-10); R5-174, p.17 (20-24); R5-174, p.18 (21-25); and I-95 (R5-154, p.12 (1-7)). None of these witnesses observed any careless, reckless, or other notable behavior associated with a deputy's "going above the posted speed," (R5-154, p.24 (22-25); R5-164, p.24 (14-18); R5-166, p.11 (3-6) and (13); R5-168, p.14 (1-7); R5-170, p.36 (11-14); R5-175, p.8 (8-11)); nor did these witnesses see or come upon any of these deputies involved in a vehicular accident. (R5-164, p.18 (19-24); R5-168, p.14 (13-15); R5-170, p.36 (8-10); R5-171, p.10 (24-25); p.11 (1-6); R5-174, p.35 (18-20); R5-175, p.18 (1-7)).

None of the witnesses could identify specifically Deputy Watson or any other deputy as having been one of the deputies observed (R5-154, p.11 (8-20); p.21 (9-11); R5-164, p.17 (20-25); p.20 (18-19); and p.24 (19-24); R5-166, p.12 (1-11); p.15; R5-168, p.14 (25); p.15 (1); R5-170, p.28 (12-20); R5-171, p.9 (19-21); p.11 (7-8); p.16 (4-6); R5-174, p.22 (10-12); R5-175, p.14 (5-9); and none could identify any of those observed as being black. (R5-154, p.15 (5-7); R5-170, p.42 (4-13); R5-171, p.9 (2-3); R5-174, p.20 (16-18); p.35 (10-12)). None of these witnesses knew the purpose

of the deputy's travel and drew their conclusions based upon the lack of activation of the patrol car's lights and siren. (R5-154, p.15 (22-25); R5-168, p.8 (17-24); p.14 (10-12); R5-175, p.18 (15-18)). None of these persons testified that they notified the County of Volusia of such observations before the accident in question. (R5-154, p.15 (15-17); R5-164, p.17 (4-11); R5-168, p.8 (15-16); R5-170, p.30 (5-8); p.34 (4-10); R5-171, p.10 (12-17); p.17 (2-3); R5-174, p.15 (13-17); p.20 (25); p.21 (1-9); R5-175, p.14 (17-19)).

Plaintiffs also rely on the testimony of their expert, Kenneth Harms, that sheriffs deputies had *no clear* written policies regarding operation of patrol vehicles and discipline for violations. (emphasis added) (R-153, pp.81, 89-91; 100; 102; 113-117).

Mr. Harms had not reviewed the entire Policy and Procedures Manual of the Volusia County Department of Public Safety prior to his testimony and his document review included accidents *after* January 23, 1989. (R5-153, p.153). To have a clear written policy, he testified required a schedule of sanctions but he could name no jurisdiction which had such a policy. *Id.* at pp.93-98. Based on a review of departmental records and depositions, which he acknowledged was not all the documentation available, Mr. Harms opined there was a *defacto* policy allowing deputies to speed to non-emergency matters condoned by supervisors at the highest levels of the Department of Public Safety inclusive of the Sheriff and that the pervasive condoned conduct resulted in dozens and dozens of accidents known to the Sheriff and other county officials who took no action which Mr. Harms

viewed as discipline. *Id.* at p.28; p.163. Mr. Harms admitted he had found both oral and written reprimands in those he did review (*Id.* at p.114) but Mr. Harms asserted that the type and number of sanctions that were imposed created a lawless atmosphere and encouraged deputies to drive however they wanted. He denied he had been so encouraged when he was given a verbal reprimand. *Id.* at 98. He admitted that his analysis did not categorize by officer, accident type, or ratio of accidents to miles driven. *Id.* at 115.

Mr. Harms reviewed no records of George Lee Watson reflecting that George Lee Watson exceeded the speed limit. (R5-153, p.72, p.145). Mr. Harms indicated that all the depositions he reviewed no deponent reported observing George Lee Watson operating a patrol car above the posted speed. (R5-153, p.149).

RE: TRAINING

In the middle 1970's former Sheriff Edwin Duff, II, supported the creation of a training facility to teach Volusia County deputy sheriffs an Emergency Vehicle Operation Course (EVOC) above that taught in basic law enforcement ("rookie") school. (R5-147); (R5-169, p.91), (R6-192, pp.10, (16-34)). Sheriff Duff obtained the approval of the County Council of Volusia County and the Department received an LEAA grant. *Id.* A driving track was constructed on County property with the grant. (R5-147).

The driving course was taught during a 40 hour period and included classroom instruction and vehicular operation by students under low and moderate speed/

high stress conditions on the track. (R5-142); (R5-165, p.30); (R5-155, p.70-71) EVOC was taught through the Daytona Beach Community College as the certifying agency for the curriculum, using qualified instructors from the college and the Volusia County Department of Public Safety. (R5-142); (R5-165, p.76); (R5-145, pp.97, 98, 102); (R5-155, pp.70-71); (R5-160, pp.25-27); (R5-172, pp.19-24). The training included Florida law regarding use of the patrol car for emergency and non-emergency matters. (R5-155, p.43 (19)); (R5-172, pp.23-25). By inference deputies were not taught that they could exceed the speed limit for non-emergency matters with or without the patrol car's emergency lights activated although there might be appropriate occasions to do so without the siren. (R5-155, p.44 (20-21); p.43 (19)).

From the inception of EVOC in 1979 through the date of the subject accident, the County of Volusia sent all sheriff's deputies to this course regardless of hire date. (R5-136, Exhibit 2); (R5-142). All deputies hired after the creation of the course were required to attend the course and satisfactorily complete the same as a condition of employment. *Id*. Following his employment by the County of Volusia, Deputy Watson satisfactorily completed the state certified course in October of 1982. (R5-142); (R5-179); (R5-180). Deputy Watson was a certified law enforcement officer when he was hired by the County of Volusia. (R6-193, p.29 (23-28); p.30 (1-3)). Deputy Watson attended EVOC two times because it was required of new hires at both the City of Port Orange

Police Department and the County of Volusia, Department of Public Safety. Neither EVOC training was disciplinary retraining because of an accident. (R5-179, p.48 (1-3) (4-9)).

Plaintiffs offer the opinions of two experts, Dr. Joseph A. Wattleworth for accident reconstruction (R5-150) and Kenneth Harms for police liability (R5-153). Dr. Wattleworth testified that the speed of the Watson vehicle caused the accident to occur; had Deputy Watson been going the speed limit, the accident would not have occurred as Watson's perception/reaction (stopping time) would have increased sufficiently for the Rooney truck to clear the intersection. (R5-153, p.82; pp.109-110).

Kenneth Harms found that except for speed, Deputy Watson was engaged in no other dangerous driving practices on the night in question (R5-153, p.47); and Mr. Harms agreed that the speed in this case is more akin to a high speed response than a police pursuit at high speeds. *Id.* at 120. The speed was assumed based on Dr. Wattleworth's opinion. *Id.* at 27. Mr. Harms opined that a deputy sheriff should be trained on a "high speed" track if that deputy sheriff will operate a patrol vehicle at high speed. *Id.* at 131-134. When he was Miami's Police Chief, Mr. Harms acknowledges that his officers were not trained on a high speed track, *id.* at 138, and admits that officers of the Florida Highway Patrol (of which his brother was one) are not and have not been trained on a high speed track. *Id.* at 140.

The County had its officers trained in a course certified by the State of Florida including vehicular operation over a driving course essentially the same as all other

driving courses for training law enforcement officers in Florida and the United States. (R5-143). The training required by Volusia County exceeded the state basic requirements for law enforcement officers in the operation of a motor vehicle. *Id.*